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9 UNITED STATES DISTRICT COURT

10 EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

11 JOSEPH HARDESTY, an individual; and  
YVETTE HARDESTY, an individual,

12 Plaintiffs,

13 v.

14 SACRAMENTO METROPOLITAN AIR  
15 QUALITY MANAGEMENT DISTRICT, a  
municipal entity and political subdivision of the  
16 state of California; DAVID GROSE, in his  
individual capacity as an employee of  
17 Sacramento Metropolitan Air Quality  
Management District; CINDY STORELLI, in  
18 her official and individual capacity as Senior  
Planner for Sacramento County; LEIGHANN  
19 MOFFITT, in her official and individual  
capacity as Interim Planning Manager for  
20 Sacramento County; BRET M. KOEHLER, in  
his official and individual capacity as Senior  
21 Engineering Geologist of the Office and Mine  
Reclamation; DENNIS O'BRYANT, in his  
22 official and individual capacity as an employee  
of the Office of Mine Reclamation; GAY  
23 NORRIS, in her official and individual capacity  
as an employee of the Office of Mine  
24 Reclamation; STEVE TESTA, in his official  
and individual capacity as an employee of the  
25 California State Mining and Geology Board;  
ZACHARY SIMMONS, an individual; LIZ  
26 GREGORY, in her official and individual  
capacity as an employee of the Department of  
27 Fish and Game; CURT TARAS; in his official  
and individual capacity as Chief, Encroachment  
28 Control & Land Use Section of the Central

CASE NO.: 2:10-cv-02414-GEB-JFM

**SECOND AMENDED COMPLAINT FOR  
VIOLATIONS OF THE CIVIL RIGHTS  
ACT OF 1871, 42 U.S.C. § 1983, BIVENS  
ACTION, THE SUPREMACY CLAUSE,  
THE FOURTH AMENDMENT TO THE  
UNITED STATES CONSTITUTION, THE  
FIFTH AMENDMENT TO THE UNITED  
STATES CONSTITUTION, THE  
FOURTEENTH AMENDMENT TO THE  
UNITED STATES CONSTITUTION, AND  
REQUEST FOR JUDICIAL REVIEW  
UNDER THE ADMINISTRATIVE  
PROCEDURE ACT**

**DEMAND FOR JURY TRIAL**

1 Valley Flood Protection Board;  
2 SACRAMENTO COUNTY, a political  
3 subdivision of the state of California; ROBERT  
4 SHERRY, Director of Sacramento Department  
5 of Planning and Community Development, in  
6 his official and individual capacity; UNITED  
7 STATES ARMY CORPS OF ENGINEERS, a  
8 federal agency; AND DOES 1 through 10,  
9 inclusive,

10 Defendants.

11  
12 Plaintiffs Joseph Hardesty (“Joe”) and Yvette Hardesty (“Yvette”) (collectively  
13 “Plaintiffs” or “Hardesty”), owners of Hardesty Sand and Gravel (“HSG”), hereby allege as  
14 follows:

15 **JURISDICTION UNDER CIVIL RIGHTS ACT**

16 1. This action is based upon, and seeks to redress violations of, the Civil Rights Act of  
17 1871, 42 U.S.C. § 1983, the Supremacy Clause, the Fourth Amendment to the United States  
18 Constitution, the Fifth Amendment to the United States Constitution, and the Fourteenth  
19 Amendment to the United States Constitution, caused by Defendants acting under the color of law,  
20 enforcing their practices, policies, ordinances, resolutions, customs and usage of regulations  
21 adopted, employed and ratified by their supervisors. Accordingly, this Court has jurisdiction over  
22 this action pursuant to 28 U.S.C. §1331 & 1343, in that this action arises under the Constitution and  
23 laws of the United States. In addition, this action seeks redress under the Administrative Procedure  
24 Act, 5 U.S.C. § 701 *et seq.*, (“APA”) and jurisdiction is proper in this Court for such judicial review  
25 pursuant to the APA and 28 USC § 1331. *See, e.g., Sackett v. EPA*, 132 S. Ct. 1367, 1374 (U.S.  
26 2012); *Barnes v. United States DOT*, 655 F.3d 1124, 1134 (9th Cir. 2011).

27 **JURISDICTION UNDER A BIVENS ACTION**

28 2. This action is also based upon, and seeks to redress, violations and denial of  
Constitutional rights by federal officers acting under federal law under *Bivens v. Six Unknown  
Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Accordingly, this Court has  
jurisdiction over this action pursuant to 28 U.S.C. § 1331 & 1343, in that this action arises under the  
Constitution and the laws of the United States.

1 VENUE

2 3. Venue lies in this Judicial District pursuant to 28 U.S.C. § 1391(b)(1) because  
3 Plaintiffs and at least one of the Defendants reside in this District, and the events giving rise to  
4 Plaintiffs' claims occurred in this District.

5 INTRODUCTION

6 4. HSG operates the Schneider Family Mine ("Mine" or "Property") under a  
7 historically grandfathered and vested right to mine. Primarily because of this vested right, HSG  
8 legally avoids significant costs which other mines pay and is therefore able to charge lower prices  
9 than its competitors for aggregate material.

10 5. Over time, HSG's competitors ("Competitors") have become increasingly angry by  
11 the "inherent unfairness" of this perfectly-legal vested right. Accordingly, in 2007, they initiated a  
12 campaign to induce a United States Senator and Congressman, as well as a number of government  
13 departments and agencies, to drive HSG out of business. Indeed, emails and correspondence  
14 between the various Defendants show they concocted an illegal and odiferous plan to invent illusory  
15 and unsupported regulatory "violations" against HSG to please the Competitors. Similarly, emails  
16 from those same Competitors express outright glee at the subsequent misfortune of HSG.

17 6. The Defendants' ruthless use of their official positions to drive HSG out of business  
18 has been shameful. Unfortunately, however, through their unprecedented, pretextual and  
19 unconstitutional overregulation, Defendants have succeeded in shutting down HSG's entire Mine  
20 operation. In addition, they are now preventing HSG from removing approximately three million  
21 dollars (\$3,000,000.00) of already-processed aggregate material from the Mine. The point is, of  
22 course, to not only stop HSG's operation, but to also break its back by cutting off access to the  
23 financial resources needed in order to protect itself from the Defendants' onslaught. By succeeding  
24 in eliminating Hardesty's liberty interest in pursuing their profession, and by wiping out HSG's  
25 expected future earnings from the Mine, the Defendants have inflicted damages upon the Plaintiffs  
26 which easily exceed one hundred million dollars (\$100,000,000.00).

27 7. The magnitude of Defendants' unethical behavior herein "shocks the conscious."  
28 Surprisingly-brazen statements show the true motives behind their concerted actions. Indeed, notes

1 from a 2010 meeting at Congressman Dan Lundgren’s office reveal the government manufacturing  
2 a nefarious regulatory plan designed to fix an “unfair competitive situation” by deciding which  
3 “agency has the biggest handle . . . [and letting] everything else . . . pile on top of it.” (See Exhibit  
4 “A”). Other exemplar emails also show the Defendants’ actions had nothing to do with enforcing  
5 the law but, rather, were designed to placate the Competitors’ political demands by eliminating  
6 HSG. (See Exhibit “B” (email from Department of Conservation employee that, “[t]his isn’t just a  
7 question about compliance with the law; Senator Cox’s letter is also about competitive advantage,  
8 and, potentially, terminating a contract between one operator and a public agency. . . .”); see also  
9 Exhibit “C” (email from a Resources Agency employee stating, “DFG has apparently had 7 or 8  
10 folks visit the site and they’ve found nothing at the site to warrant them doing anything further,”  
11 subsequent to which both DFG and the DOC increased their efforts to find violations)).

12 8. Government agencies may only enforce the rules and regulations within their  
13 jurisdiction. They cannot seek to “level the playing field” at the behest of private companies and  
14 the Senators and Congressmen they lobby. Unfortunately, however, that is exactly what occurred in  
15 this case. A sampling of the Defendants’ egregious behavior includes:

- 16 • The County of Sacramento revoking the vested right to mine without notice to Plaintiffs;
- 17 • An United States Army Corps of Engineers (“ACE”) employee issuing a cease and desist  
18 order trying to shut down the Mine without providing Plaintiffs with any notice, a hearing,  
or right to appeal;
- 19 • An ACE employee (Defendant Simmons), together with a Department of Fish & Game  
20 (“DFG”) employee (Defendant Gregory), admittedly conducting an unauthorized search of  
the Mine and getting caught in the process;
- 21 • A DFG engineer conspiring with and continuously advising the Office of Mine Reclamation  
22 (“OMR”) and the State Mining & Geology Board (“SMGB”) regarding how to find a  
“substantial variation” (later termed “substantial deviation”) in order to force HSG to file a  
23 new reclamation plan, despite there being no violations at the Mine;
- 24 • A Senator requesting that the California Resources Agency coordinate with other agencies  
25 to review HSG and determine whether HSG could be removed from the AB 3098 List (a list  
of approved aggregate operations from whom the state can purchase material); and OMR  
26 Defendants Koehler and O’Bryant later selectively enforcing rules and regulations to  
remove HSG from the AB 3098 list while allowing similarly-situated mining companies to  
remain on the list;
- 27 • An officer (Defendant Taras) of the Central Valley Flood Protection Board (“CVFPB”)  
28 issuing a cease and desist order demanding that HSG stop all work at the Mine without  
providing any notice, a hearing, or opportunity for appeal;

- 1 • Defendant Sacramento County and its employees (Defendant Storelli and Moffitt)  
2 selectively enforcing its regulations by increasing Plaintiffs' financial assurances under  
3 SMARA from \$164,223.00 to \$830,490.00, while not updating and enforcing the financial  
4 assurances of similarly-situated mining companies, nor increasing those assurances to reflect  
5 their greater size; and
- 6 • Defendant Sacramento County entering into a signed agreement with virtually all of  
7 Plaintiffs' Competitors (known as the Memorandum of Understanding or "MOU") in which  
8 those Competitors agreed to fund a "full-time aggregate planner" position designed to drive  
9 HSG out of business through repeated inspections and greatly-increased financial  
10 assurances. The County did not provide HSG with an opportunity to join the MOU group.
- 11 • Indeed, the Defendants' were so desperate to "get" the Plaintiffs that they became rather  
12 blatant in their efforts to manufacture false violations by forcing inspectors, like Mike  
13 Winters, to issue violation notices when the inspector had not found any violations. The  
14 day after Mr. Winters admitted this practice, he was demoted to the position of dog catcher.

15 9. In sum, Defendants have flagrantly used their official positions under color of law  
16 for the benefit of HSG's Competitors, who admit at every turn their frustration over HSG's vested  
17 right. By catering to the desires of private companies that lobby powerful politicians, Defendants  
18 have inexcusably violated Joe and Yvette's civil rights and inflicted substantial monetary damages.  
19 This lawsuit seeks to redress those damages and the Defendants' outrageous conduct.

#### THE PARTIES

20 10. At all times mentioned herein, Plaintiff JOSEPH HARDESTY is an individual  
21 residing in Sacramento County, and is a co-owner of HSG.

22 11. At all times mentioned herein, Plaintiff YVETTE HARDESTY is an individual  
23 residing in Sacramento County, and is a co-owner of HSG.

24 12. At all times mentioned herein, Defendant SACRAMENTO METROPOLITAN AIR  
25 QUALITY MANAGEMENT DISTRICT ("SMAQMD") is and has been the local agency  
26 designated to regulate air emission in Sacramento County, California, a unit of local government,  
27 duly formed and authorized under the laws of the State of California. Upon information and belief,  
28 SMAQMD as part of its duties, regulates and provides supervision of all persons employed by  
SMAQMD and is responsible for its ordinances, resolutions, customs, practices, policies and usage  
of regulations. Upon information and belief, SMAQMD's responsibility is to provide redress to  
Plaintiffs and to properly supervise its employees. SMAQMD is being sued herein as a person.

1           13.     At all times mentioned herein, Defendant DAVID GROSE (“Grose”) is and has been  
2 a public officer employed by SMAQMD, and the County of Sacramento, for the purposes of  
3 enforcing SMAQMD's municipal ordinances, resolutions, customs, practices, policies, usage of  
4 regulations and state law. Defendant Grose is enriched, rewarded, and compensated for his official  
5 duties and carries out discretionary functions while in his official capacity as a unit of local  
6 government, duly formed and authorized under the laws of the State of California. Defendant Grose  
7 is being sued individually for creating or authoring written and unwritten practices and policies that,  
8 when adopted, employed, and ratified by his supervisors, deny the Plaintiffs their civil rights.

9           14.     At all times mentioned herein, Defendant CINDY STORELLI (“Storelli”) is and has  
10 been a public officer employed by Sacramento County. Defendant Storelli is enriched, rewarded,  
11 and compensated for her official duties and carries out discretionary functions while in her official  
12 capacity as a unit of state government, duly formed and authorized under the laws of the State of  
13 California. Defendant Storelli is sued in her individual capacity.

14           15.     At all times mentioned herein, Defendant LEIGHANN MOFFITT (“Moffitt”) is and  
15 has been a public officer employed by Sacramento County. Defendant Moffitt is enriched,  
16 rewarded, and compensated for her official duties and carries out discretionary functions while in  
17 her official capacity as a unit of state government, duly formed and authorized under the laws of the  
18 State of California. Defendant Moffitt is sued in her individual capacity.

19           16.     At all times mentioned herein, Defendant BRET M. KOEHLER (“Koehler”) is and  
20 has been a public officer employed by the Office of Mine Reclamation (“OMR”). Defendant  
21 Koehler is enriched, rewarded, and compensated for his official duties and carries out discretionary  
22 functions while in his official capacity as a unit of state government, duly formed and authorized  
23 under the laws of the State of California. Defendant Koehler is sued in his individual capacity.

24           17.     At all times mentioned herein, Defendant DENNIS O’BRYANT (“O’Bryant”) is and  
25 has been a public officer employed by the Office of Mine Reclamation (“OMR”). Defendant  
26 O’Bryant is enriched, rewarded, and compensated for his official duties and carries out discretionary  
27 functions while in his official capacity as a unit of state government, duly formed and authorized  
28 under the laws of the State of California. Defendant O’Bryant is sued in his individual capacity.

1           18.     At all times mentioned herein, Defendant GAY NORRIS (“Norris”) is and has been  
2 a public officer employed by OMR. Defendant Norris is enriched, rewarded, and compensated for  
3 her official duties and carries out discretionary functions while in her official capacity as a unit of  
4 state government, duly formed and authorized under the laws of the State of California. Defendant  
5 Norris is being sued in her individual capacity for creating or authoring written and unwritten  
6 practices and policies that, when adopted and employed, deny the Plaintiffs their civil rights.

7           19.     At all times mentioned herein, Defendant STEVE TESTA (“Testa”) is and has been  
8 a public officer employed by the California State Mining and Geology Board (“SMGB”).  
9 Defendant Testa is enriched, rewarded, and compensated for his official duties and carries out  
10 discretionary functions while in his official capacity as a unit of state government, duly formed and  
11 authorized under the laws of the State of California. Defendant Testa is being sued individually for,  
12 *inter alia*, creating or authoring written and unwritten practices and policies, that when adopted and  
13 employed deny the Plaintiffs their civil rights.

14           20.     At all times mentioned herein, Defendant ZACHARY SIMMONS (“Simmons”) is  
15 and has been a public officer employed by the United States Army Corp. of Engineering (“ACE”).  
16 Defendant Simmons is enriched, rewarded, and compensated for his official duties and carries out  
17 discretionary functions while in his official capacity as a unit of federal government, duly formed  
18 and authorized under the laws of the United States. Defendant Simmons is being sued in his  
19 individual capacity under *Bivens* for violations of the Fourth and Fifth Amendments of the United  
20 States Constitution.

21           21.     At all times mentioned herein, Defendant LIZ GREGORY (“Gregory”) is and has  
22 been a public officer employed by the Department of Fish and Game (“DFG”). Defendant Gregory  
23 is enriched, rewarded, and compensated for her official duties and carries out discretionary  
24 functions while in her official capacity as a unit of state government, duly formed and authorized  
25 under the laws of the State of California. Defendant Gregory is being sued individually for  
26 violation of the Fourth Amendment of the United States Constitution.

27           22.     At all times mentioned herein, Defendant CURT TARAS (“Taras”) is, and has been,  
28 a public officer employed by the Central Valley Flood Protection Board (“CVFPB”). Defendant

1 Taras is enriched, rewarded, and compensated for his official duties and carries out discretionary  
2 functions while in his official capacity as a unit of state government, duly formed and authorized  
3 under the laws of the State of California. Defendant Taras is sued in his individual capacity.

4 23. At all times mentioned herein, Defendant SACRAMENTO COUNTY is and has  
5 been a unit of local government, duly formed and authorized under the laws of the State of  
6 California. Upon information and belief, Sacramento County, as part of its duties, regulates and  
7 provides supervision of all persons employed and is responsible for its ordinances, resolutions,  
8 customs and usage of regulations. Upon information and belief, Sacramento County is responsible  
9 for providing redress to Plaintiffs and for supervising its employees. Sacramento County is being  
10 sued as a person.

11 24. At all times mentioned herein, Defendant ROBERT SHERRY (“Sherry”) is and has  
12 been a public officer and the Director Sacramento Department of Planning and Community  
13 Development. Defendant Sherry is enriched, rewarded, and compensated for his official duties and  
14 carries out discretionary functions while in his official capacity as a unit of state government, duly  
15 formed and authorized under the laws of the State of California. Defendant Sherry is sued in his  
16 individual capacity.

17 25. At all times mentioned herein, Defendant UNITED STATES ARMY CORPS OF  
18 ENGINEERS (“ACE”) is and has been a federal agency, duly formed and authorized under the laws  
19 of the United States of America.

20 26. Plaintiffs do not know the true names or capacities, whether individual, corporate,  
21 partnership or otherwise, of Defendants Does 1 through 10, inclusive, and therefore sue said  
22 Defendants under fictitious names. Plaintiffs are informed and believe that each of the fictitiously  
23 named defendants is responsible for the events referred to herein. When Plaintiffs ascertain the true  
24 names and capacities of Does 1 through 10, it will amend this Complaint accordingly.

25 27. Plaintiffs are further informed and believe, and on that basis allege, that each of the  
26 defendants herein is liable for the damages to Plaintiffs in some manner.

27 /////

28 /////



1 **GENERAL ALLEGATIONS**

2 **The Vested Right to Mine**

3 28. Plaintiffs Joseph and Yvette own and operate HSG, a sand and gravel operation in  
4 the County of Sacramento (“Sacramento County” or simply “County.”) The Mine, located in  
5 eastern Sacramento County, has been in operation on the Schneider Family Ranch since at least the  
6 early 1900’s, and is owned by Jay Schneider (“Schneider”) and family. Hardesty leases the Mine  
7 and is authorized by contract to mine and process aggregate material. Pursuant to the contract,  
8 Hardesty has exclusive control of the Mine areas and processing.

9 29. In response to evidence submitted by Schneider, Defendant Sacramento County  
10 wrote a letter in 1994 confirming historical grandfathered vested rights to mine the Property absent  
11 the need for future surface mining and/or conditional use permits under the California Surface  
12 Mining and Reclamation Act (“SMARA”). This letter specifically acknowledges that the evidence  
13 presented by Schneider was “accepted as evidence of vested interest and therefore . . . a use permit  
14 for the mining operation [would not be required].” (*See* Exhibit “D”). This confirmation was  
15 reaffirmed in many subsequent communications with Sacramento County.

16 30. Also in 1994, the County, after an exhaustive investigation of the Mine's previous  
17 mining history over the last one-hundred or more years, issued a written statement acknowledging  
18 the vested right to mine the Property. The County's vested right determination was further affirmed  
19 during a separate matter on a writ of mandate before the California Superior Court, when the  
20 County pleaded as the real party in interest that the right to mine the Property is vested. (*See*  
21 Exhibit “E”). The County's recognition of this vested right is in compliance with SMARA § 2776  
22 and, therefore, a use permit for mining is not required.

23 31. HSG has been the principal operator at the Mine, without any notable complaints or  
24 findings of violations, since the early 1980’s. The Mine is operated pursuant to the aforementioned  
25 vested legal non-conforming use and a Reclamation Plan, which was approved by Sacramento  
26 County on November 8, 2002. In addition, representatives of Sacramento County performed its  
27 required annual site inspection of the Mine in December 2008, and concluded that the Mine was  
28 operating in accordance with the Reclamation Plan and in accordance with applicable SMARA

1 requirements. Hardesty has continued to operate the Mine in accordance with the Reclamation Plan  
2 and in accordance with SMARA.

3 **Competitors Organize a Political Campaign to Drive Hardesty Out of Business**

4 32. Customers often choose to buy from HSG rather than its Competitors because  
5 HSG's prices for aggregate products are generally much lower. Among other reasons, HSG can  
6 charge reduced prices because it can mine and conduct related aggregate production operations  
7 without the costs associated with obtaining a land use permit.

8 33. Starting in or about March 2007, and continuing to the present, employees at one of  
9 HSG's Competitors (Teichert), including Becky Wood and John Lane, began to contact various  
10 state and federal agencies complaining that the Hardesty operation was "attempting to steal [their]  
11 customers through the sale of very cheaply priced product," and requesting that the agencies  
12 coordinate efforts to regulate Hardesty, thereby driving up his prices. (See Exhibit "F"). The  
13 agencies contacted included at least Defendant SMAQMD, the Central Valley Regional Water  
14 Quality Control Board, US Fish and Wildlife Services, and ACE.

15 34. On information and belief, the Competitors also requested the assistance of state  
16 Senator Dave Cox and Congressman Dan Lungren to bolster the campaign against Hardesty and  
17 motivate the agencies. Various of the Competitors and their employees regularly contributed  
18 substantial amounts to the political campaigns of Senator Cox and Congressman Lundgren. In  
19 addition, one competitor in particular (Teichert) directly employs the brother of Congressman  
20 Lungren as a lobbyist to further Teichert's financial and political interests.

21 35. On information and belief, due to the Competitors' political maneuvering, Defendant  
22 Simmons of ACE and others began to organize a coordinated investigation of the HSG operation at  
23 the Mine in or around early 2008.

24 36. As a result of these coordinated political actions facilitated by the Competitors, the  
25 Defendants have, and continue to, arbitrarily and capriciously investigate and overregulate Hardesty  
26 to drive Joe and Yvette out of business. Accordingly, and as described in further detail below,  
27 Plaintiffs have been deprived of their civil rights under the Supremacy Clause, Fourth Amendment,  
28 Fifth Amendment, and Fourteenth Amendment.

**Michael S. Jewell and Zachary Simmons of ACE Begin the Campaign**

1  
2 37. In or about May 2008, Hardesty received a phone call from Defendant Simmons'  
3 office, a representative of the ACE. Simmons requested a site inspection of the Mine, contending  
4 that Hardesty's operations were improperly impacting wetlands. Hardesty asked Simmons to place  
5 his request in writing and to identify the Army's specific concerns with the Mine in order to evaluate  
6 his request for an inspection.

7 38. Without any inspection of the property, notice, or any type of hearing, on June 2,  
8 2008, Michael S. Jewell sent a letter to Hardesty ordering Hardesty to cease and desist all  
9 operations at the Mine, claiming that the ACE had determined that Hardesty was discharging  
10 dredged or fill material into creeks and wetlands without an ACE permit. Jewell sent the letter to  
11 the Sacramento County Planning Department, U.S. Fish and Wildlife Services, Central Valley  
12 Regional Water Quality Control Board, California State Water Resources Control Board, U.S.  
13 Environmental Protection Agency, and the California Department of Fish and Game. To date,  
14 neither Jewell have retracted the completely-false 2008 cease and desist letter.

15 39. On or around July 9, 2008, Simmons met with Hardesty to discuss the issues raised  
16 in the cease and desist letter. Hardesty informed Mr. Simmons that the information contained in the  
17 June 2, 2008 cease and desist letter was incorrect and offered to allow Mr. Simmons to inspect the  
18 areas the cease and desist letter claimed were in violation.

19 40. Acting in good faith, Hardesty arranged for Simmons to inspect the areas that were  
20 the subject of the cease and desist letter. However, at the site inspection, Simmons realized that the  
21 allegations of the cease and desist letter were unsubstantiated and he therefore demanded  
22 permission to inspect the complete mine premises, above and beyond the areas which were the  
23 subject of the cease and desist letter. Hardesty refused. When Simmons and his team found no  
24 violation, Hardesty soon realized that Simmons was simply on a "witch hunt" to retroactively justify  
25 the ACE cease and desist letter, and that the letter was just a ruse to obtain access to the Mine to  
26 conduct a warrantless search. Unable to locate any real violations at the July site inspection, on or  
27 around September 5, 2008, Defendant Simmons contacted Defendant Liz Gregory, of DFG  
28 ("Gregory"), to discuss an inspection of the Mine without notice or a warrant.

1           41.     Thereafter, in September of 2008, Defendants Simmons and Gregory entered the  
2 Mine without a warrant and began conducting a site inspection. Simmons was conducting this  
3 unauthorized search at the behest of Dan Lundgren's office. According to a Memorandum authored  
4 by Simmons, he and Gregory illegally inspected, at least, a dam on the southernmost creek, the  
5 processing facility, and the creek along the north east side of the processing facility. Once Hardesty  
6 realized Simmons and Gregory were on the Mine conducting a warrantless search, they were  
7 immediately asked to leave.

8           42.     The ACE cease and desist letter has been forwarded to a multitude of governmental  
9 agencies, along with the unlawfully obtained information, in an attempt to defame HSG or convince  
10 the governmental agencies that HSG is in violation of something, despite the fact that the ACE  
11 found no violation. To date, ACE has not retracted its fictitious and pretextual cease and desist  
12 letter, and has not afforded Hardesty any opportunity to appeal that decision.

13     **With No Results From the Initial Efforts, the Senator and Congressman Take a More Active**  
14                                     **Role at Competitors' Instruction**

15           43.     After ACE's site inspection failed to turn up any violations, and the cease and desist  
16 letter produced no tangible results, Senator Dave Cox and Congressman Dan Lungren, at the  
17 Competitors' insistence, began to take action using the details gleaned from Simmons' and  
18 Gregory's illegal search to further fuel their demands for more aggressive agency investigations.

19           44.     In or about September 2008, Congressman Lundgren's representative contacted  
20 Simmons to discuss the ACE's investigation of the Mine. On information and belief, pursuant to  
21 the Congressman's request, Simmons continued his investigation into the Hardesty operation and  
22 reported his findings directly to the Congressman's office.

23           45.     On or about October 3, 2008, Senator Dave Cox sent a letter to the Secretary of the  
24 California Resources Agency. (*See* Exhibit "G"). In this letter, the Senator requested that the  
25 Resources Agency coordinate departmental actions within the Agency, including the Department of  
26 Conservation ("DOC"), SMGB, and the DFG, to review Hardesty's mining operations for potential  
27 legal violations, including specifically reviewing whether Hardesty could be precluded from being  
28 listed on the AB 3098 List. *Id.* The AB 3098 List is a list of approved aggregate operations where

1 the state can purchase material. According to Surface Mine and Reclamation Act ("SMARA"),  
2 OMR must put any mine that has a reclamation plan, financial assurances, and an annual mining  
3 inspection on the AB 3098 List. On February 4, 2009, in recognition that Hardesty had met all of  
4 these requirements, OMR informed Hardesty that the Mine had been placed in the AB 3098 List.  
5 Because of the Defendants illegal conduct, however, OMR removed Hardesty six (6) weeks later  
6 without any notice or hearing despite their compliance with SMARA.

7 46. The Secretary of the California Resources Agency responded to the Senator on  
8 November 6, 2008, notifying the Senator that the California Resources Agency had initiated a  
9 coordinated review of the Hardesty operation with the Department of Fish and Game and the  
10 Department of Conservation. (*See* Exhibit "H").

11 47. In or around February 12, 2009, Simmons reported to the Congressman's office that  
12 the Hardesty "operation did not impact a large number of waters of the United States similar to  
13 those proposed by the other mining companies who have complained about Hardesty." (*See* Exhibit  
14 "I"). Nevertheless, Simmons assured the Congressman's office that he would continue to work  
15 with various state agencies to investigate the Mine. *Id.*

16 **Pursuant to the Senator and Congressman's Requests OMR Joined the Campaign**

17 48. Upon receiving the Senator's October 3, 2008 letter, the Resources Agency  
18 contacted the DOC, the SMGB, and the DFG and began a collective investigation of the operations  
19 at the Mine.

20 49. The Secretary of the Resources Agency responded to the Senator on November 6,  
21 2008, notifying the Senator that the Resources agency had coordinated a review of the Hardesty  
22 operation with DFG and Game and the Department of Conservation. (*See* Exhibit "H").

23 50. By November, emails from individuals at the Resources Agency indicate that  
24 wardens from the DFG had visited the Mine but found no potential violations that warranted  
25 additional investigation. Nevertheless, Defendants Bret M. Koehler ("Koehler"), Dennis O'Bryant  
26 ("O'Bryant"), and Gay Norris ("Norris") of OMR (a sub-agency of the DOC), in coordination with  
27 Kris Vyverberg ("Vyverberg"), Senior Engineering Geologist of DFG, arbitrarily and capriciously  
28 continued to investigate how to shut down HSG.

1           51.     Vyverberg had previously submitted an Interoffice Memorandum to Defendants  
2 Gregory and Norris of OMR, admitting that the current, County-approved plan placed almost no  
3 limits on mining activities within the defined mining boundaries.

4           52.     Yet, Vyverberg continued to explain how “substantial variations” (later, “substantial  
5 deviations”) from the operations described in the existing reclamation plan could be used to force  
6 HSG to file a new reclamation plan. She then noted that the current reclamation plan limited slopes  
7 to 30 feet or less, and implied that pit depth would be the way to find a substantial variation.

8           53.     On or about December 23, 2008, Koehler, O’Bryant, Norris and several other  
9 representatives of OMR performed an inspection of the Mine.

10          54.     On or about February 3, 2009, Vyverberg sent an email to individuals at the  
11 Resources Agency indicating that Vyverberg met with OMR and that OMR would approach the  
12 County with the “substantial deviations” theory to induce the County, as lead agency, to act. The  
13 correspondence also reveals OMR’s failed attempt to work with the Attorney General’s office to  
14 secure a cease and desist injunction. (*See* Exhibit “J”).

15          55.     On or about February 27, 2009, Koehler completed an inspection report, which  
16 identified several alleged violations of SMARA and other statutory requirements. All of these  
17 purported violations were baseless and imaginary.

18          56.     On March 18, 2009, O’Bryant, acting outside of the scope of his authority, sent a  
19 letter to Hardesty summarizing Koehler’s incorrect allegations and informing Hardesty that due to  
20 these false violations Hardesty was being removed from the AB 3098 List effective as of that date.

21          57.     Accordingly, the “substantial deviation” plan succeeded based upon trumped up and  
22 inaccurate violations.

23          58.     In fact, there is no means to remove a company from the AB 3098 List when they are  
24 in full compliance with SMARA, as HSG was at the time it was removed. Further, O’Bryant  
25 provided no prior notice that OMR was considering removing Hardesty from this list, and provided  
26 no hearing or other procedure by which Hardesty could challenge the findings of Koehler or  
27 O’Bryant’s reports before being removed from the AB 3098 List.

28

1           59. Defendants intentionally failed and refused to remove other similarly-situated mining  
2 operators from the AB 3098 list despite mining violations almost identical to those alleged against  
3 Plaintiffs. Among these similarly-situated mining operators is the Lehigh Southwest Cement  
4 Company which, despite receiving a Notice of Violation during the same time frame as Plaintiffs  
5 received such a notice, continued to be included on the AB 3098 list for at least five (5) years.  
6 Lehigh also remained on the list despite violations like “pit slope” instability and expanding  
7 operations outside the approved reclamation boundary (i.e., a “substantial deviation”). As a result,  
8 Defendants intentionally discriminated against HSG such that it was treated as a class of one.

9           60. This action caused severe damage to Hardesty's ability to sell aggregate to state or  
10 local agencies, a significant portion of their customer base.

11           61. Pursuant to OMR's alleged findings, the Department of Conservation (“DOC”) filed  
12 a Complaint and a Request for a Temporary Restraining Order against Hardesty on March 18, 2009  
13 (“DOC Action”). On March 20, 2009, the Superior Court denied the Request for a Temporary  
14 Restraining Order. Shortly thereafter, DOC dismissed the action without prejudice pursuant to a  
15 settlement agreement.

16           62. On March 18, 2009, counsel for Hardesty sent a letter to Stephen M. Testa (“Testa”),  
17 of the State Mining and Geology Board (“SMGB”) requesting an appeal of the Mine's removal  
18 from the AB 3098 List. On March 24, 2009, O'Bryant and Testa, acting outside the scope of their  
19 authority, denied Hardesty's request for appeal, stating that just as there is no mechanism for a  
20 hearing prior to a removal decision, OMR also does not provide any administrative procedure for  
21 appealing its decision relating to the AB 3098 List. O'Bryant and Testa's actions singled out  
22 Hardesty by removing it from the AB 3098 List when it was in full compliance with SMARA.

23           63. On March 30, 2009, counsel for Hardesty responded to O'Bryant's letter and notified  
24 him of the due process concerns associated with removing the Mine from the AB 3098 List without  
25 an opportunity for a hearing or appeal, and again requested an appeal. Once again, this request was  
26 refused. O'Bryant, Testa and Koehler continue to keep deprive Hardesty of any notice or  
27 opportunity for a hearing or appeal. As a result, Hardesty cannot sell mined materials to state or  
28 local agencies, a significant portion of his customer base, which has a significant financial impact

1 on the business. No state remedies exist to rectify this issue, as O'Bryant and Testa have denied  
2 Hardesty any ability to appeal this decision.

3 **Improper Instructions Not to Buy from Hardesty**

4 64. On information and belief, on or about October or November of 2008, Defendant  
5 Norris, an OMR agent, acted outside the scope of her authority by stopping several contractors in  
6 their trucks outside of HSG and instructing them not to buy aggregate from Hardesty. Defendant  
7 Norris warned the contractors that if they were to buy aggregate from Hardesty, OMR would sue  
8 them. Norris used her authority under the color of law to impede and interfere with Hardesty's  
9 business, threatening HSG customers with governmental action if they continued to purchase  
10 Hardesty products or aggregate.

11 65. Defendant Norris did not stop and threaten truck drivers hauling material from any  
12 other similarly-situated mining operations which were not on the AB 3098 list, including, but not  
13 limited to, the operator of the Horseshoe Mine.

14 66. In addition, upon information and belief, on July 21, 2010, a currently-unknown (and  
15 thus potentially a DOE) ACE official used his or her authority under the color of law to impede and  
16 interfere with Hardesty's business by instructing Mike Castor, a trucker and a contractor, not to buy  
17 "Joe's rock" in order to further destroy HSG's business.

18 **SMAQMD Issues an Improper Order of Abatement and Implementation of a Practice and**  
19 **Policy Regarding the Definition of a "Single Site"**

20 67. In April of 2009, after all their efforts to shut Hardesty down had failed, the  
21 Defendants tried a new tact. SMAQMD, acting in conjunction with the Competitors' campaign,  
22 then improperly issued a Petition alleging that Hardesty Sand and Gravel ("HSG") was operating  
23 equipment in violation of SMAQMD Rule 201. The Petition listed several pieces of equipment  
24 including (1) a generator that was used as a non-stationary Central Plant Engine, and (2) several  
25 additional engines and equipment under 175 horsepower.

26 68. Regulation of the non-stationary Central Plant Engine is expressly prohibited by  
27 California State Law. In California, the California Air Resources Board ("CARB") has the primary  
28 responsibility for control of air pollution from vehicular and non-stationary nonroad engines,



1 whereas local and regional authorities, such as SMAQMD, have control over air pollution from  
2 stationary engines. The California Legislature enacted statutory provisions governing the  
3 registration of portable equipment (“PERP”). Health & Saf. Code § 41750, *et seq.* If an engine has  
4 a PERP permit, it does not need to obtain a permit from the local air district. Health & Saf. Code §  
5 41753(b). In order to obtain a PERP permit, an engine must not remain at a “fixed location” for  
6 more than twelve consecutive months. Health & Saf. Code § 41751. The Legislature has defined a  
7 “fixed location” to be any “single site at a building, structure, facility, or installation.” Health &  
8 Saf. Code § 41751(b)(1).

9         69. In addition, regulation of the non-stationary Central Plant engine and other engines  
10 and equipment **under 175 horsepower** is expressly preempted by federal law. Under the federal  
11 Clean Air Act, 42 U.S.C. sections 7401, *et seq.*, (“CAA”) the federal government has authority to  
12 promulgate regulations containing standards applicable to new nonroad engines and vehicles. The  
13 CAA, under § 7543(e)(1)(A) expressly prohibits states and local governments from adopting or  
14 enforcing “any standard or other requirement relating to the control of emissions from . . . nonroad  
15 engines . . . **smaller than 175 horsepower.**” 42 U.S.C. § 7543(e)(1)(A)(emphasis added). For  
16 those vehicles 175 horsepower or more, the CAA, under § 7543(e)(2)(A), allows California to  
17 “adopt and enforce standards and other requirements relating to the control of emissions” only after  
18 obtaining a waiver from the Administrator of the Environmental Protection Agency. The CAA  
19 distinguishes between “standards” and very minimal “in-use requirements,” such as carpool lanes,  
20 restrictions on car use, and controls over extended engine idling. The latter are not preempted.

21         70. SMAQMD Rule 201 is in direct violation of the CAA because it requires a permit to  
22 operate any nonroad engine over **50 horsepower** which emits 2 lbs of pollutant or more per hour  
23 without the benefit of air pollution control devices. SMAQMD Rule 201.

24         71. Similarly, SMAQMD Rule 201 is in direct violation of the CAA because it attempts  
25 to regulate engines outside the scope of its waiver. CARB has obtained a waiver from the EPA to  
26 regulate emission standards of **stationary** nonroad engines. However, SMAQMD has enforced  
27 Rule 201 against Hardesty's **non-stationary** nonroad engine. SMAQMD only has authority to  
28 regulate stationary engines. Both federal law, 40 CFR 89.2 and California State Law, CA 13

1 § 2452, in recognition of 40 CFR 89.2, define portable engines and stationary engines and the  
2 distinguishing characteristics between the two classes. A stationary engine is one that remains at a  
3 “fixed location” for more than twelve (12) consecutive months. Although SMAQMD has not  
4 defined “fixed location,” CARB has defined a “fixed location” is a “single site at a building,  
5 structure, facility, or installation.” CARB has not defined the term "site."

6 72. The Mine is not a “fixed location” pursuant to CARB’s definition because it is a  
7 massive 3800 acre property. Hardesty’s engine is not a stationary engine because in addition to  
8 travelling to three other sites from Placerville to Nevada, it travels around the entire 3800 acres of  
9 the Mine. Nevertheless, SMAQMD has attempted to classify the Mine as a “fixed location,” taking  
10 advantage of the fact that, unlike CARB, SMAQMD has not actually defined “fixed location.” This  
11 is an improper attempt at an underground regulation. The waiver obtained by CARB only allows  
12 the regulation of those nonroad engines that do not remain at a “single site at a building, structure,  
13 facility, or installation." SMAQMD has improperly regulated Hardesty’s engine outside the scope  
14 of the waiver.

15 73. Defendant Grose, at the hearings on SMAQMD's Order of Abatement, stated  
16 SMAQMD's practice and policy of defining the term "single site" to mean the entire 3800 acre  
17 Mine. This definition of "single site" is contrary to both state and federal law. This definition was  
18 accepted and ratified by the Hearing Board and the Superior Court. SMAQMD and Grose  
19 implementation and enforcement of this practice and policy violates Plaintiffs' rights to the use of  
20 their property and equipment. In addition, because SMAQMD has not held a hearing required  
21 before the implementation of such a policy or practice the use of such a policy is a clear violation of  
22 due process.

23 74. This policy and practice of defining the Mine as a "single site" is not applied to  
24 similarly-situated people. George Poppic, of CARB, testified at a hearing before the County, that  
25 CARB regularly declares that nonroad engines that travel only 25 to 30 feet at the same location,  
26 are not considered to be at a single site if there is a legitimate business purpose for the movements.  
27 Hardesty has to move their engines around the Mine in order to operate their business effectively.  
28 In addition, on information and belief, SMAQMD has approached other individuals and instructed

1 them to move their nonroad portable engines to the next yard in order to avoid obtaining a  
2 stationary permit.

3 75. The Mine is not a "fixed location" pursuant to the CAA, or CARB's definition of a  
4 "single site." Accordingly, Hardesty's engines are not stationary engines because in addition to  
5 traveling around the 3800 acre property, the engine travels to four other sites from Placerville to  
6 Ione, California and Nevada. Nevertheless, SMAQMD has attempted to classify the mine as a  
7 "fixed location." This is an improper attempt to use a policy and practice or an underground  
8 regulation to expand SMAQMD and Grose's jurisdiction from stationary engines to include portable  
9 engines. SMAQMD and Grose have improperly regulated Hardesty's engine outside the scope of  
10 the waiver.

11 76. Despite this clear law and a multi-day evidentiary hearing, SMAQMD Board issued  
12 an Order of Abatement determining that Hardesty was operating its equipment in violation of Rule  
13 201. At the Order of Abatement hearing in 2009, under penalty of perjury, members of SMAQMD,  
14 including Defendant Grose, and CARB testified to differing definitions of a "single or fixed  
15 location." SMAQMD ordered Hardesty to cease and desist operations of all specified unpermitted  
16 and unregistered engines pending compliance with SMAQMD Rule 201. However, SMAQMD  
17 stayed the abatement order pending timely application for and issuance of the specified permits.

18 77. On October 2, 2009, Hardesty petitioned the Superior Court of California, under  
19 California Code of Civil Procedure § 1094.5 for a Writ of Mandate arguing, in part, that (1) CARB's  
20 rules and regulations as set forth in the PERP program preempt SMAQMD from enforcing the  
21 PERP program and regulations under State law; (2) CARB's PERP regulations preempt Rule 201;  
22 (3) regulation of the Central Plant Engine is based upon an improper underground regulation; and  
23 (4) SMAQMD's attempts to regulate the Hardesty mining operations interferes with Schneider's  
24 vested legal non-conforming use.

25 78. On January 5, 2010, SMAQMD requested that CARB exercise its independent  
26 authority and declare the PERP registered equipment to be stationary sources when used at the  
27 Mine. On February 18, 2010, Goldstene, on behalf of CARB notified Hardesty of SMAQMD's  
28 request and issued CARB's determinations and conclusions. Goldstene held that the engines and

1 equipment units at the Mine were not PERP eligible because (1) they resided at a single location for  
2 more than twelve consecutive months; and (2) the Mine is a stationary source, and the engines and  
3 equipment units operated at the Mine are part of that stationary source.

4 79. On March 10, 2010, Hardesty appealed Goldstene's decision. On June 24, 2010, the  
5 CARB Hearing Officer, upheld Goldstene's holdings generally, but disagreed with Goldstene as to  
6 the portability of some of the engines. The Hearing Officer held that the engines covered by  
7 Registration Numbers 135452 and 135453 were portable and were PERP eligible. During the  
8 pendency of this appeal, Goldstene and CARB intervened in the SMAQMD action opposing  
9 Hardesty's Writ of Mandate arguing against Hardesty's preemption argument as well as his vested  
10 legal non-conforming use argument.

11 80. On June 24, 2010, the Superior Court of California denied Hardesty's application  
12 and upheld the Abatement Order.

13 81. On July 6, 2010, Goldstene, on behalf of CARB, denied Hardesty's appeal of the  
14 CARB decision.

15 82. With no other choice, Hardesty applied to SMAQMD for permits despite the federal  
16 Clean Air Act preempting this permitting requirement. Hardesty spent over \$50,000 in applying for  
17 the permits. On August 19, 2010, Grose, on behalf of SMAQMD, denied Hardesty's applications  
18 advising Hardesty in a letter that:

19 **...[A]ny type of operation at the facility, including but not limited to operating**  
20 **any air pollutant emitting equipment or engines, sand and gravel processing**  
21 **equipment, the loading or unloading of trucks, and the movement of aggregate**  
22 **from the stockpiles, prior to receiving an Authority to Construct/Permit to**  
23 **Operate from the District is a violation of the air pollution regulations and is**  
24 **subject to civil or criminal penalties prescribed in the California Health and**  
25 **Safety Code. Any such activity will also violate the Abatement Order issued by**  
26 **the District Hearing Board.**

27 83. This Letter was, at a minimum, overbroad in its application of the ruling made by the  
28 SMAQMD Board because the Board stated in its order that Hardesty and his employees were to (1)  
"cease and desist from operation of any and all unpermitted and unregistered internal combustion  
engines with a horsepower greater than 50 at any location within the District's boundaries," and (2)  
"cease and desist from operation of the Central Plant Equipment (or any equipment that replaces or

1 supplements the Central Plant Equipment) unless and until they obtain from the SMAQMD an  
2 Authority to Construct and Permit to Operate as required by SMAQMD Rule 201." Further, this  
3 letter overreaches SMAQMD's jurisdiction as defined by CARB. CARB's intervening brief  
4 submitted in opposition to Hardesty's Petition for Writ of Mandate specifically stated "The State Air  
5 Board has exclusive authority over the regulation of mobile sources of air pollution and the fuels  
6 they use" and "Local air districts . . . have primary authority of stationary sources." CARB's  
7 intervening brief makes no mention of SMAQMD or CARB's authority over "any type of operation  
8 at the facility, including . . . the movement of aggregate from the stockpiles." In fact, CARB's brief  
9 explicitly stated that "the issue in this action is . . . not whether Hardesty may continue their mining  
10 operations at the Hardesty facility." Despite this, Grose's August 19, 2010 letter attempts to totally  
11 restrict the Hardesty mining operations.

12 84. On September 22, 2010, Grose, on behalf of SMAQMD, rescinded the August 19,  
13 2010 permit denial but did not rescind the cease and desist order. To date, neither Grose nor  
14 SMAQMD has rescinded the cease and desist order.

15 **The Competitors' Campaign Also Results in an Improper**  
16 **Cease and Desist Letter from the CVFPB**

17 85. On or about May 14, 2009, in a further effort to "pile [alleged violations] on top of  
18 [alleged violations]," Defendant Curt Taras ("Taras") of the Central Valley Flood Protection Board  
19 ("CVFPB"), along with the Department of Fish and Game ("DFG") conducted a site inspection of a  
20 portion of the Mine along the Cosumnes River.

21 86. On May 28, 2009, without any type of a hearing, Taras sent Joe Hardesty a letter  
22 citing various alleged violations and ordering him to "cease and desist all work regulated by the  
23 California Water Code and California Code of Regulations . . . [including] excavation work, levee  
24 alterations, reservoir filling, and dam construction." To date, this unfounded cease and desist letter  
25 has not been withdrawn.

26 **Two Years Later, the Competitors' Campaign Has Not Relented**

27 87. In or about late 2009 and early 2010, Congressman Lundgren's office contacted  
28 Teichert, ACE, DFG, and the U.S. Fish and Wildlife Services to coordinate further efforts and "pick

1 [the investigation] up again." (*See* Exhibit "K"). The Congressman's office organized various  
2 "task force" meetings to discuss the Hardesty operation.

3 88. Handwritten notes from a January 27, 2010, meeting at Congressman Lundgren's  
4 office, attended by a number of the individuals and agencies involved in this Complaint, reveal the  
5 Competitors' politically-backed plan. (*See* Exhibit "A") Those notes disclose the Competitors'  
6 involvement in the Hardesty investigation, and state that the plan is to determine which "agency has  
7 the biggest handle . . . [and] everything else will pile on top of it." (*Id.*)

8 89. Pursuant to this plan, on April 16, 2010, without any notice or type of hearing, Jewell  
9 sent another cease and desist letter to Hardesty alleging the unauthorized discharge of dredged or  
10 fill material into jurisdictional waters. Jewell copied U.S. Fish and Wildlife Service, U.S.  
11 Environmental Protection Agency, Central Valley Regional Water Quality Control Board, and  
12 Sacramento County Municipal Services Agency. To date Jewell has not retracted either of the  
13 baseless cease and desist letters, which have now become final agency action of the ACE.

14 **Sacramento County Board of Supervisors Revoke the**  
15 **Vested Legal Non-Conforming Use**

16 90. Upon information and belief, Sacramento County received a great deal of political  
17 backlash from the Competitors' campaign because Sacramento County is the lead agency for the  
18 Hardesty operation. As a result, Sacramento County extinguished the vested right to mine the  
19 Property -- which Sacramento County had confirmed in 1994 and reaffirmed in 2002 -- due to an  
20 alleged impermissible intensification of operations.

21 91. In or about April, 2010, the owner of the Mine, Jay Schneider, received a notice from  
22 Sherry on behalf of Sacramento County stating that an investigation had revealed that the mining  
23 operation had expanded in violation of zoning requirements. Neither Hardesty nor his lawyers  
24 received notice of the alleged violation even though the County was clearly aware that Hardesty  
25 was the operator of the Mine. Despite Schneider's vested right to mine, Sherry notified Schneider  
26 that he could either (1) obtain a rezone and a conditional use permit; or (2) cease the mining  
27 operation within 90 days. The County noted that if neither of these courses of action were taken by  
28 July 14, 2010 one or more of the following actions would be taken: (1) a hearing before a County

1 appointed Hearing Officer to declare the property a public nuisance, (2) referral of the case to the  
2 County Counsel's Office to initiate legal action, (3) a public hearing to revoke any use permit or  
3 other discretionary permit, and/or (4) referral of the case to the District Attorney's office for  
4 criminal prosecution.

5 92. On April 27, 2010, Schneider appealed the notice of violation citing the vested legal  
6 non-conforming use. The appeal was scheduled to be heard on May 26, 2010, but was continued to  
7 July 13, 2010. Again, neither Hardesty nor his lawyers were given notice of the alleged violation or  
8 the hearing.

9 93. On July 6, 2010, Mr. Schneider requested that the hearing be continued to October  
10 13, 2010. On July 8, 2010 counsel for one of the Competitors (Teichert) wrote a letter to the  
11 County Board of Supervisors requesting that Schneider's appeal be denied.

12 94. On September 20, 2010, counsel for Schneider submitted a letter to the Board of  
13 Supervisors detailing the conclusions made by the County in 1994 and again in 2002, which granted  
14 a vested right to Mine the property.

15 95. On September 28, 2010, the Deputy County Counsel issued proposed Findings for  
16 the Board of Supervisors, supporting the Notice of Violation and denying Mr. Schneider's appeal.  
17 The Board of Supervisors voted to adopt the proposed findings and denied Mr. Schneider's appeal.  
18 Hardesty never received notice of the appeal, the scheduled hearing thereon, the proposed Findings  
19 or the Board of Supervisors' denial of the appeal.

20 96. On October 7, 2010, OMR issued a letter to the County providing 15-day notice that  
21 the County must take enforcement action pursuant to SMARA to correct the violations occurring at  
22 the Mine. Again, Hardesty never received notice.

23 97. Schneider also appealed this decision, and on Wednesday, May 4, 2011, the County  
24 Board of Supervisors denied his appeal. Once again, Hardesty never received notice.

25 98. Although Hardesty could apply for a conditional use permit, the County has already  
26 stated they would not permit Hardesty to continue mining operations during the pendency of a  
27 conditional use permit application. The conditional use permitting process can take anywhere from  
28 six to eight years and can cost millions of dollars. Given the number of years the permitting effort

1 would take, the fact that Hardesty would not be allowed to conduct business during this time and  
2 the exorbitant cost (which HSG cannot afford since the County is now preventing HSG from even  
3 removing its already-processed material from the site), requiring Hardesty to obtain a conditional  
4 use permit would completely destroy HSG's business. This is not an adequate substitute for a  
5 vested right to mine the Property.

6 **Sacramento County Arbitrarily and Capriciously**

7 **Increases Hardesty's Financial Assurances**

8 99. Pursuant to the Competitors' backed plan to determine which "agency has the  
9 biggest handle . . . [and have] everything else . . . pile on top of it," on January 24, 2011, Leighann  
10 Moffitt of Sacramento County sent Plaintiffs a letter demanding a valid Financial Assurance  
11 Mechanism ("FAM") in the amount of \$830,490.00 and ordering Plaintiffs to cease and desist all  
12 operations at the Mine until such a FAM was in place. This increase was in stark contrast to  
13 Sacramento County's November 17, 2010 approval of Hardesty's revised Financial Assurance Cost  
14 Estimate ("FACE") of \$164,223.00, which determines the FAM.

15 100. However, this was not the first time that Sacramento County had attempted to  
16 arbitrarily and capriciously increase Plaintiffs' FAM. On April 2, 2009, Sacramento County wrote  
17 to Hardesty alleging that the operations at the Mine were in violation of the currently approved  
18 reclamation plan. Sacramento County claimed that the current FAM of \$94,888.34 was inadequate  
19 and that a FAM of \$733,784.00 would be required. On June 10, 2009, counsel for Hardesty wrote  
20 to Sacramento County refuting each of the alleged violations contained in the County's April 2,  
21 2009 letter, including the large increase in the current FAM. Counsel for Hardesty pointed out that  
22 these allegations, along with other attacks on Hardesty, were baseless and harassing and demanded  
23 that they cease.

24 101. On November 17, 2010, Sacramento County approved Hardesty's revised FACE of  
25 \$164,223.00. However, on December 16, 2010, Cindy Storelli of Sacramento County provided  
26 Hardesty with the Lead Agency Annual Inspection Report for the Mine, which reflected an  
27 increased FACE of \$830,490.00 due to baseless violations, some of which were rejected in court  
28 nearly two years ago in the DOC Action.



1 102. To date, Sacramento County has not retracted the January 24, 2011, fabricated cease  
2 and desist letter or the arbitrarily-increased FAM, and has afforded Hardesty no opportunity to  
3 appeal the decision.

4 **HSG’s Competitors’ Memorandum of Agreement**

5 103. In 2004, several of Plaintiffs’ Competitors entered into a signed agreement with the  
6 County of Sacramento (known as the Memorandum of Understanding or “MOU”) in which  
7 Plaintiff’s private party Competitors agreed to fund a “full-time aggregate planner” position (known  
8 as a “Resource Manager”) for Sacramento County.

9 104. The agreed-upon duties of the Resource Manager are, among other things, to oversee  
10 mine-related applications, conduct annual SMARA inspections, and ensure compliance with project  
11 mitigation, monitoring and reporting. In essence, the Resource Manager oversees virtually aspects  
12 of aggregate mines similar to the Mine operated by HSG. The Competitors thereafter funded the  
13 Resource Manager position.

14 105. The MOU was subsequently amended several times to thereafter add additional  
15 funded positions and other mining operators as parties (all of whom are HSG’s competitors).  
16 Hardesty, however, has been singled out and thus not offered to join as a party to the MOU.

17 106. Not surprisingly, while the Resource Manager coordinated with other defendants to  
18 hammer Hardesty into submission with inspections and greatly increased financial assurances  
19 (which resulted in severe penalties and shutting down the Mine due to the posting of alleged  
20 inadequate financial assurances) and, ultimately, forced HSG out of business, the Plaintiffs’  
21 similarly-situated Competitors, who were also signatories to the MOU, have enjoyed virtually no  
22 regulatory oversight even though their financial assurance postings remained tens, and even  
23 hundreds, of thousands of dollars below the required amounts.

24 **COUNT ONE**

25 **(42 U.S.C. § 1983 Violation of The Due Process Clause and Equal Protection Clause of the**  
26 **Fourteenth Amendment and the Supremacy Clause Against SMAQMD, and David Grose)**

27 107. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 106 above, and  
28 incorporate those allegations herein by this reference.

1           108. The herein above described actions by Defendants SMAQMD, and David Grose,  
2 acting under the color of state law, county ordinances, regulations, customs and usage of regulations  
3 and authority, individually and in their official capacity, and in violation of 42 U.S.C. § 1983 have  
4 deprived Plaintiffs of their rights under the Supremacy Clause, as well as their rights privileges or  
5 immunities secured by the Due Process Clause of the Fourteenth Amendment.

6           109. Specifically Defendants SMAQMD, and David Grose have deprived Plaintiffs of  
7 their rights under the Supremacy Clause and Due Process Clause through their ordinances,  
8 resolutions, customs and usage of regulations policy and practice of (1) regulating construction  
9 equipment under 175 horsepower; (2) enforcing state law regulating construction equipment under  
10 175 horsepower; (3) declaring the entire Mine a single location in violation of 40 CFR 89.2; and (4)  
11 issuing an order that Plaintiffs cannot operate any piece of mechanical equipment to load rock at  
12 Plaintiffs' plant, despite the fact that SMAQMD and Grose do not have the authority to do so.

13           110. In addition, SMAQMD and Grose have deprived Plaintiffs of their rights under the  
14 Due Process Clause by enacting a policy that the 3800 acre Mine is a "single site" despite the fact  
15 that the United States Environmental Protection Agency ("EPA") ruled in 2005 that the grounds of a  
16 facility, such as the 3800 acre Mine, could not be considered a "single site." Rather, a single site  
17 was a building, structure, facility, or installation. The EPA held that if an engine moved around the  
18 grounds of a facility, it was not a stationary source as the grounds could not be considered a "single  
19 site." Nevertheless, Grose argued in front of the Air Board that the Hardesty Mine was a "single  
20 site." The Air Board approved Grose's position and declared that the Mine was a "single site."

21           111. Similarly, Defendants SMAQMD and David Grose have deprived Plaintiffs of their  
22 rights under the Supremacy Clause and Due Process Clause through their ordinances, resolutions,  
23 customs, usage of regulations, policies and practices by creating an "emission standard" that  
24 prohibits emission levels of PM, NOx, and SOx in excess of 2 pounds per day without purchasing a  
25 permit. The quantitative level can only be calculated by the use of techniques, controls, and  
26 technology HSG does not possess.

27           112. Finally, Defendants SMAQMD and David Grose have deprived Plaintiffs of their  
28 rights under the Equal Protection Clause through their ordinances, resolutions, customs, usage of

1 regulations, policies and practices by defining the Property as a "single site" while similarly situated  
2 people are not subject to the same definition. Similarly situated people are allowed to move their  
3 non-road engines only 25 to 30 feet and, thereafter, the location at which they do that is not  
4 considered a "single site."

5 113. As a direct and proximate result of the foregoing, Plaintiffs have incurred substantial  
6 costs arising from SMAQMD, and David Grose's enforcement of Rule 201. In violation of Section  
7 1983, SMAQMD and Grose used purported police powers under the color of state law to interfere  
8 with Hardesty's business and to stop him from removing aggregate thereby depriving him of a  
9 legally cognizable property interest without the due process of law. Specifically, SMAQMD and  
10 Grose have ordered Hardesty to cease and desist from obtaining any new aggregate from the Mine.  
11 SMAQMD and Grose have enforced this cease and desist order by coming out to the Mine to ensure  
12 that Hardesty was not removing aggregate. This, in turn disrupted Hardesty's business resulting in  
13 the loss of customers and the loss of sales. In addition, Hardesty has incurred significant costs  
14 associated with obtaining permits, as well as substantial costs in defending civil prosecutions. All  
15 of these costs go to the Plaintiffs' damages in an amount according to proof at trial.

16 114. Plaintiffs are further entitled to their attorneys' fees pursuant to 42 U.S.C. § 1988.

17 115. Grose engaged in such actions maliciously, willfully, and knowingly. Accordingly,  
18 Plaintiffs are entitled to punitive damages.

19 **COUNT TWO**

20 **(42 U.S.C. § 1983 Equal Protection Violation of the Fourteenth Amendment Against**

21 **Bret M. Koehler, Gay Norris, Steve Testa, and Dennis O'Bryant)**

22 116. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 115 above, and  
23 incorporate those allegations herein by this reference.

24 117. In 1994, the County of Sacramento recognized a vested right to mine at the Property.  
25 In 2002, the County of Sacramento reaffirmed this finding in the Reclamation Plan approval process  
26 under SMARA. Accordingly, Plaintiffs have a constitutionally protected property interest in  
27 mining at the Property under the vested right. Since the 1994 grant of the vested right to mine the  
28 Property, there has been no intensification of mining activity outside the scope of the vested right.

1           118. Hardesty has fulfilled all of their obligations under SMARA by operating under a  
2 vested right to mine, submitting Reclamation Plans as required, by submitting Financial Assurance  
3 Cost Estimates, and by posting Financial Assurances. Accordingly, Hardesty is entitled to be listed  
4 on the AB 3098 List.

5           119. Moreover, the Plaintiffs enjoyed a Constitutionally-protected liberty interest in  
6 pursuing their chosen occupation or profession of surface mining.

7           120. Defendants Bret M. Koehler, Gay Norris, Steve Testa and Dennis O'Bryant, acting  
8 under the color of state law, county ordinances, regulations, customs and usage of regulations and  
9 authority, individually and in their official capacity, and in violation of 42 U.S.C. § 1983, have  
10 deprived Plaintiffs of the rights, privileges or immunities secured by the Equal Protection Clause by  
11 selectively enacting and enforcing a policy and practice which denied Hardesty the right to notice  
12 and an appeal of their removal from the AB 3098 List.

13           121. Defendants Bret M. Koehler, Gay Norris, Steve Testa and Dennis O'Bryant have  
14 violated Plaintiffs' rights to equal protection by intentionally and irrationally singling out Plaintiffs  
15 for unwarranted removal from the AB 3098 List.

16           122. Specifically, these Defendants intentionally allowed other similarly-situated mining  
17 operators to remain on the AB 3098 list despite mining violations virtually identical to those alleged  
18 against Plaintiffs, but singled out Plaintiffs for removal from the list. For example, one of the  
19 similarly-situated mining operators is the Lehigh Southwest Cement Company which, despite a  
20 Notice of Violation during the same time period that Plaintiffs received a similar Notice of  
21 Violation, continued to be included on the AB 3098 list for at least five (5) years with purported  
22 violations like "pit slope" instability and expanding operations outside the approved reclamation  
23 boundary (i.e., a "substantial deviation").

24           123. Similarly, the Defendants, and specifically Gay Norris, and others directed by the  
25 Defendants, while intentionally stopping and threatening truck drivers who were hauling material  
26 from Plaintiffs' mine due ostensibly to the Plaintiffs non-inclusion on the AB 3098 list, did not stop  
27 and threaten truck drivers hauling material from other similarly-situated mining operations which  
28 were not on the AB 3098 list, including, but not limited to, the operator of the Horseshoe Mine.

1 This conduct of treating Plaintiffs differently than the other similarly-situation miners was irrational  
2 and placed Hardesty in a class of one.

3 124. Even as to those other mining operators who may have eventually been removed  
4 from the AB 3098 list (such as Lehigh Southwest Cement Company), the Defendants specifically  
5 explained to them how they might be reinstated to the AB 3098 list, while intentionally rebuffing  
6 and ignoring the Plaintiffs' inquiries into how they might be reinstated to the AB 3098 list and,  
7 ultimately, intentionally mis-advised Plaintiffs that there was no mechanism by which they could be  
8 reinstated to the AB 3098 list.

9 125. The reason for Plaintiffs differential treatment from the similarly-situated mining  
10 operators was not rationally related to any legitimate state interest but, rather, was based upon the  
11 Defendants' malicious, irrational and arbitrary intention to drive Plaintiffs out of business as alleged  
12 hereinabove. Any other stated reason is false or pretextual.

13 126. As a direct and proximate result of the foregoing, Plaintiffs have incurred substantial  
14 costs arising from Plaintiffs' inability to sell its mined materials to state or local agencies, including,  
15 without limitation, lost profits, all to the Plaintiffs' damage in an amount according to proof at trial.

16 127. Defendants engaged in such actions maliciously, willfully, and knowingly.  
17 Accordingly, Plaintiffs are entitled to punitive damages.

18 128. Plaintiffs are further entitled to their attorneys' fees pursuant to 42 U.S.C. § 1988.

19 **COUNT THREE**

20 ***(Bivens Action for Violation of the Right to be Free From Unreasonable Searches***

21 ***Under the Fourth Amendment Against Zachary Simmons)***

22 129. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 128 above, and  
23 incorporate those allegations herein by this reference.

24 130. In 1994, the County of Sacramento recognized a vested right to mine at the Property.  
25 In 2002, the County of Sacramento reaffirmed this finding in the Reclamation Plan approval process  
26 under SMARA. Accordingly, Plaintiffs have a constitutionally protected property interest in  
27 mining at the Property under the vested right. Since the 1994 grant of the vested right to mine the  
28 Property, there has been no intensification of mining activity outside the scope of the vested right.

1 131. Defendant Zachary Simmons, acting under the color of federal authority, has  
2 violated Plaintiffs' rights under the Fourth Amendment to be free from unreasonable search and  
3 seizure under the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403  
4 U.S. 388 (1971).

5 132. Defendant Zachary Simmons has violated Plaintiffs' right to be free from  
6 unreasonable search and seizure under the Fourth Amendment by conducting an unwarranted search  
7 of the Mine in September of 2008.

8 133. Mr. Simmons entered the property and, according to his own Memorandum,  
9 inspected at least a dam on the southernmost creek, the processing facility, and the wetland and  
10 creek along the north east side of the processing facility.

11 134. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an  
12 amount according to proof at trial. Simmons has used purported police powers under the color of  
13 federal law to interfere with Hardesty's business and to stop him from removing aggregate, thereby  
14 depriving him of a legally-cognizable property interest. Plaintiffs have been damaged from the use  
15 of the information obtained from the search. On information and belief, the information obtained  
16 from the search also provided the basis for Michael Jewell's 2010 cease and desist letter, which was  
17 sent to U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, Central Valley  
18 Regional Water Quality Control Board, and Sacramento County Municipal Services Agency.

19 135. Plaintiffs have been deprived of the ability to operate their mining business without  
20 disruption and have lost customers and sales – and potentially the Mine itself - as a direct result of  
21 the issuance of the cease and desist order.

22 136. In addition, on information and belief, the information obtained from the illegal  
23 search was disseminated to various other municipal, state and federal agencies resulting in  
24 subsequent cease and desist orders that have deprived Hardesty of the ability to operate at the Mine.

25 137. Defendants engaged in such actions maliciously, willfully, and knowingly.  
26 Accordingly, Plaintiffs are entitled to punitive damages.

27 138. Plaintiffs are further entitled to their attorneys' fees pursuant to 42 U.S.C. § 1988.

28 **COUNT FOUR**

1                   **(42 U.S.C. § 1983 Violation of the Fourth Amendment Protection Against**  
2                   **Unreasonable Search and Seizure Against Liz Gregory)**

3           139. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 138 above, and  
4 incorporate those allegations herein by this reference.

5           140. Defendant Liz Gregory, acting under the color of state law, county ordinances,  
6 regulations, customs and usage of regulations and authority, individually and in her official  
7 capacity, and in violation of 42 U.S.C. § 1983, has deprived Plaintiffs of the right against unlawful  
8 search and seizure provided by the Fourth Amendment

9           141. Defendant Liz Gregory has violated Plaintiffs' right to be free from unreasonable  
10 search and seizure under the Fourth Amendment by conducting an unwarranted search of the Mine  
11 in September of 2008.

12           142. Ms. Gregory entered the property and, according to Mr. Simmons' Memorandum,  
13 inspected at least a dam on the southernmost creek, the processing facility, and the wetland and  
14 creek along the north east side of the processing facility.

15           143. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an  
16 amount according to proof at trial.

17           144. Defendant engaged in such actions maliciously, willfully, and knowingly.  
18 Accordingly Plaintiffs are entitled to punitive damages.

19           145. Plaintiffs are further entitled to their attorneys' fees pursuant to 42 U.S.C. § 1988.

20                                   **COUNT FIVE**

21                   **(42 U.S.C. § 1983 Violation of Right to Substantive and Procedural Due Process Protected**  
22                   **by the Fourteenth Amendment Against Curt Taras)**

23           146. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 145 above, and  
24 incorporate those allegations herein by this reference.

25           147. In 1994, the County of Sacramento recognized a vested right to mine at the Property.  
26 In 2002, the County of Sacramento reaffirmed this finding in the Reclamation Plan approval process  
27 under SMARA. Accordingly, Plaintiffs have a constitutionally protected property interest in  
28

1 mining at the Property under the vested right. Since the 1994 grant of the vested right to mine the  
2 Property, there has been no intensification of mining activity outside the scope of the vested right.

3 148. Hardesty has fulfilled all of their obligations under SMARA by operating under a  
4 vested right to mine the Property, submitting Reclamation Plans as required, by submitting  
5 Financial Assurance Cost Estimates, and by posting Financial Assurances.

6 149. Defendant Curt Taras, acting under the color of state law, county ordinances,  
7 regulations, customs and usage of regulations and authority, individually and in his official  
8 capacity, and in violation of 42 U.S.C. § 1983, has deprived Plaintiffs of the rights, privileges or  
9 immunities secured by the Due Process Clause of the Fourteenth Amendment.

10 150. Defendant Curt Taras has violated Plaintiffs' right to substantive and procedural due  
11 process by issuing a cease and desist letter demanding that Hardesty stop all work regulated by the  
12 California Water Code and California Code of Regulations at the Mine without any notice, hearing,  
13 or opportunity for appeal.

14 151. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an  
15 amount according to proof at trial. Taras has used purported police powers under the color of state  
16 law to interfere with Hardesty's business and to stop him from removing aggregate thereby  
17 depriving him of a legally cognizable property interest without the due process of law. Specifically,  
18 Plaintiffs have been deprived of the ability to operate their mining business without disruption and  
19 have lost customers and sales as a direct result of the issuance of the cease and desist order.

20 152. Defendants engaged in such actions maliciously, willfully, and knowingly.  
21 Accordingly, Plaintiffs are entitled to punitive damages.

22 153. Plaintiffs are further entitled to their attorneys' fees pursuant to 42 U.S.C. § 1988.

23 **COUNT SIX**

24 **(U.S.C. § 1983 Violation of the Due Process Clause and the Equal Protection Clause of the**  
25 **Fourteenth Amendment Against Sacramento County and Robert Sherry)**

26 154. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 153 above, and  
27 incorporate those allegations herein by this reference.

28



1           155. In 1994, Sacramento County recognized a vested right to mine at the Property. In  
2 2002, the County of Sacramento reaffirmed this finding in the Reclamation Plan approval process  
3 under SMARA. Since at least 2002, there has been valid reclamation plans in place for the Mine.  
4 Accordingly, Plaintiffs have a Constitutionally-protected property interest in mining at the Property  
5 under the vested right. Since the 1994 grant of the vested right to mine the Property, there has been  
6 no intensification of mining activity outside the scope of the vested right.

7           156. Hardesty has fulfilled all of their obligations under SMARA by operating under a  
8 vested right to mine the Property, submitting Reclamation Plans as required, by submitting  
9 Financial Assurance Cost Estimates, and by posting Financial Assurances. In addition, there are  
10 currently valid reclamation plans in place for the Mine.

11           157. Defendants Sacramento County and Robert Sherry, acting under the color of state  
12 law, county ordinances, regulations, customs and usage of regulations and authority, and in  
13 violation of 42 U.S.C. § 1983, have deprived Plaintiffs of the rights, privileges or immunities  
14 secured by the Due Process Clause of the Fourteenth Amendment, specifically the right to  
15 procedural due process and substantive due process, through their ordinances, resolutions, customs  
16 and usage of regulations policy and practice by arbitrarily, intentionally and irrationally initiating  
17 proceedings to revoke - and revoking - the vested legal non-conforming use on the Mine without  
18 providing any notice or a hearing to Hardesty.

19           158. In addition, Defendants Sacramento County and Robert Sherry, acting under the  
20 color of state law, county ordinances, regulations, customs and usage of regulations and authority,  
21 and in violation of 42 U.S.C. § 1983, have deprived Plaintiffs of their rights secured by the Equal  
22 Protection Clause of the Fourteenth Amendment by determining, after the revocation of the vested  
23 right to mine the Property, that Hardesty could not continue their mining operation during the  
24 pendency of any conditional use permit application approval. Defendants Sacramento County and  
25 Robert Sherry allow other similarly-situated mining operators to continue operating while they are  
26 seeking to obtain conditional use permits. However, the Plaintiffs have been treated differently for  
27 no rational basis. Accordingly, the Plaintiffs have been deprived of their right to Equal Protection.

28

1 159. In addition, the Defendants intentionally used alleged “substantial deviations” by the  
2 Plaintiffs in moving their plant as part of the excuse for revoking the Plaintiffs’ vested right to mine;  
3 however, the Defendants allowed other similarly-situated mining operators (for example, Western  
4 Aggregates) to move their plants without such constituting a “substantial deviation.” The reason for  
5 the Defendants’ differential treatment of Plaintiffs, as compared to the other similarly-situated  
6 mining operators, was the Defendants’ malicious, irrational and arbitrary intention to drive  
7 Plaintiffs out of business as alleged hereinabove. Any other stated reason is false or pretextual.

8 160. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an  
9 amount according to proof at trial. Specifically, Defendants Sacramento County and Robert Sherry  
10 have disrupted and interfered with Plaintiffs’ business which has resulted in, at least, lost customers  
11 and lost sales. Because Sacramento County and Robert Sherry have revoked the vested right to  
12 mine, and have ordered Hardesty to stop mining even during the pendency of any conditional use  
13 permit application approval, the Hardesty’s business relationships have suffered as their customers  
14 have been unable to purchase aggregate from them and are unlikely to return as customers because  
15 they will not think that HSG is able to continue its mining operation.

16 161. Sherry engaged in such actions maliciously, willfully, and knowingly. Accordingly  
17 Plaintiffs are entitled to punitive damages.

18 162. Plaintiffs are further entitled to their attorneys’ fees pursuant to 42 U.S.C. § 1988.

19 **COUNT SEVEN**

20 **(42 U.S.C. § 1983 Equal Protection Violation of the Fourteenth Amendment**

21 **Against the County of Sacramento, Cindy Storelli, and Leighann Moffitt)**

22 163. Plaintiffs repeat and reallege the allegations of paragraph 1 through 162 above, and  
23 incorporate those allegations herein by this reference.

24 164. In 1994, the County recognized a vested right to mine at the Property. In 2002, the  
25 County reaffirmed this finding in the Reclamation Plan approval process under SMARA.  
26 Accordingly, Plaintiffs have a constitutionally protected property interest in mining at the Property  
27 under the vested right. Since the 1994 grant of the vested right to mine the Property, there has been  
28 no intensification of mining activity outside the scope of the vested right.

1           165. Hardesty has fulfilled all of their obligations under SMARA by operating under a  
2 vested right to mine the Property submitting Reclamation Plans as required, by submitting Financial  
3 Assurance Cost Estimates, and by posting Financial Assurances.

4           166. Defendant Sacramento County, acting under the color of state law, county  
5 ordinances, regulations, customs and usage of regulations and authority, in violation of 42 U.S.C.  
6 § 1983, have deprived Plaintiffs of the rights, privileges or immunities secured by the Equal  
7 Protection Clause of the Fourteenth Amendment.

8           167. Moreover, the Plaintiffs enjoyed a Constitutionally-protected liberty interest in  
9 pursuing their chosen occupation or profession of surface mining.

10           168. Unlike the other similarly-situated mining operators in Sacramento County, the  
11 Defendants selected and hired an environmental inspector, Dan Bieber, to inspect the Plaintiffs'  
12 mining operations and prepare a FACE. Mr. Bieber was hired to inspect Plaintiffs' mining  
13 operation, and only Plaintiffs' operation, and has never been hired by the Defendants to inspect any  
14 other of the similarly-situated mining operators/competitors. Shockingly, the County arranged for -  
15 and allowed - HSG's Competitors to pay Mr. Bieber's salary for this hatchet-job inspection.

16           169. Based upon Mr. Beiber's inspections and report (which were inconsistent with his  
17 prior and subsequent admissions and which he later recanted in large part), in 2011 the Defendants  
18 Storelli and Moffitt arbitrarily and capriciously increased Plaintiffs' financial assurances from  
19 \$164,223.00 to \$830,490.00, and immediately ordered Plaintiffs to cease and desist all operations at  
20 the Mine until such financial assurance mechanisms were in place. The Plaintiffs' similarly-  
21 situated mining competitors (who, coincidentally, were signatories to the MOU, e.g., Tiechert,  
22 Granite, etc.), however, were intentionally permitted to continue operating, without interference by  
23 way of cease and desist notices from the Defendants, for a decade or more without inspections and  
24 without posting additional financial assurances which had been substantially raised.

25           170. The process which the Defendants employed in raising the Plaintiffs' financial  
26 assurances did not comply with California law (e.g., Cal. Pub. Resources Code 2773.1 *et seq.*) and  
27 although the Defendants ultimately lowered the FACE back to approximately \$177,000, they  
28

1 assessed substantial fines against the Plaintiffs for failing to post assurance in the amount of the  
2 arbitrary \$830,490 figure.

3 171. Although a statutory command exists for annual FACE adjustments based upon  
4 circumstances, the increased FACE amount from \$164,223.00 to \$830,490.00 was irrational  
5 because no significant change had occurred at the Mine since the prior year FACE inspection to  
6 warrant such a huge and unwarranted increase.

7 172. In addition, the Resource Manager, in coordination with the Defendants, conducted  
8 an unusual number of inspections of HSG, assisted in greatly increasing HSG's financial assurances  
9 and required immediate posting of the full amount of assurances in order to continue operating,  
10 while some of HSG's similarly-situated competitors, who were also signatories to the MOU (e.g.,  
11 Teichert, Granite, etc.) were enjoying virtually no regulatory oversight (e.g. no or few inspections)  
12 and were permitted to continue fully operating for years while posting financial assurances which  
13 amounted to only a fraction of their required amount.

14 173. The reason for the Defendants' differential treatment of Plaintiffs, as compared to the  
15 similarly-situated mining operators, was the Defendants' malicious, irrational and arbitrary  
16 intention to drive Plaintiffs out of business as alleged hereinabove. Any other stated reason is false  
17 or pretextual.

18 174. The Defendants intentionally treated Plaintiffs differently than other similarly-  
19 situated mine operators as alleged hereinabove and without a rational basis, thus placing Plaintiffs  
20 in a class of one.

21 175. As a direct and proximate result of the foregoing, Plaintiffs have received  
22 unwarranted fines and incurred substantial costs relating to the unequal treatment with regard to  
23 their financial assurances. Specifically, Plaintiffs have been deprived of the ability to operate their  
24 mining business without disruption and have lost customers and sales as a direct result of the  
25 issuance of the cease and desist order.

26 176. The Defendants engaged in such actions maliciously, willfully, and knowingly.  
27 Accordingly, Plaintiffs are entitled to punitive damages.

28 177. Plaintiffs are further entitled to their attorneys' fees pursuant to 42 U.S.C. § 1988.

**COUNT EIGHT**

**(Claim for Relief under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. § 701 *Et Seq*  
Against the United States Army Corps of Engineers)**

178. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 177 above, and incorporate those allegations herein by this reference.

179. In 1994, the County recognized a vested right to mine at the Property. In 2002, the County reaffirmed this finding in the Reclamation Plan approval process under SMARA. Accordingly, Plaintiffs have a Constitutionally-protected property interest in mining at the Property under the vested right. Since the 1994 grant of the vested right to mine the Property, there has been no intensification of mining activity outside the scope of the vested right.

180. ACE, through its employee Michael S. Jewell, issued two cease and desist letters demanding that Hardesty stop all operations at the Mine without any notice, hearing, or opportunity for appeal. (*See* Exhibit “L.”)

181. The cease and desist orders incorrectly allege that Hardesty “discharged dredged or fill material into creeks and wetlands tributary of the Consumnes River without a Department of Army (DA) Permit” in violation of Section 404 of the Clean Water Act (“CWA”).

182. The cease and desist letters constitute final agency action which this Court is entitled to review pursuant to the APA.

183. The cease and desist letters have all the hallmarks of APA finality because they determine rights and obligations.

184. First, the letters indicate that Hardesty may be fined, penalized, or forced to remove the unauthorized work, yet informs Hardesty that “prompt voluntary restoration of the site in accordance with a Corps-approved plan may preclude some or all of the penalties.”

185. Second, the cease and desist letters require Hardesty to submit “a written statement of [its] intent to address the unauthorized activity,” and to provide detailed information about how and when Hardesty filled the creeks and wetlands.

186. Third, the letters indicate that Michael S. Jewell may consider giving Hardesty an “after-the-fact permit,” depending upon how Hardesty responds to the cease and desist letter.

1 187. Thus, the cease and desist letters provide Hardesty with no method or entitlement to  
2 challenge the veracity of violations it claims HSG committed; Hardesty is simply ordered to take  
3 certain remedial actions. Accordingly, rights and obligations were determined by the letters.

4 188. The cease and desist letters were also final because legal consequences flow from  
5 their issuance. Hardesty is effectively left with no choice but to restore filled creeks and tributaries  
6 that he did not fill, with allegedly no right to appeal.

7 189. The cease and desist letters also mark the consummation of the agency's decision  
8 making process because the alleged violation was not subject to further agency review. For  
9 example, the 2008 letter simply demands that Hardesty submit information on the violation; it does  
10 not provide an entitlement to further agency review of the violation.

11 190. Finally, Hardesty has no other adequate remedy in Court besides this APA request  
12 for judicial review because under the CWA, judicial review ordinarily comes by way of a civil  
13 action brought by the EPA under 33 U.S.C. § 1319. Hardesty cannot initiate that process.

14 191. As a direct and proximate result of the foregoing, Plaintiffs have been deprived of  
15 the ability to operate their mining business without disruption and have lost customers and sales as a  
16 direct result of the issuance of the cease and desist orders.

17 **COUNT NINE**

18 **(42 U.S.C. § 1983 Violation of the Substantive Right to Due Process Protected**  
19 **by the Fourteenth Amendment Against All Defendants (except ACE))**

20 192. Plaintiffs repeat and reallege each and every allegation stated in paragraphs 1  
21 through 191 hereinabove, and incorporate those allegations herein by this reference.

22 193. The Fourteenth Amendment of the United States Constitution guarantees to citizens  
23 of the United States, like the Plaintiffs, freedom from the deprivation of life, liberty and property  
24 with due process of law (i.e., substantive due process).

25 194. In 1994, the County recognized a vested right to mine at the Property. In 2002, the  
26 County reaffirmed this finding in the Reclamation Plan approval process under SMARA.  
27 Accordingly, Plaintiffs have a Constitutionally-protected property interest in mining at the Property  
28

1 under the vested right. Since the 1994 grant of the vested right to mine the Property, there has been  
2 no intensification of mining activity outside the scope of the vested right.

3 195. The Plaintiffs also enjoy a Constitutionally-protected property interest in the  
4 aggregate products and material which they have mined and stockpiled on the Property and which  
5 the Defendants have unlawfully refused removal from the Property.

6 196. Finally, the Plaintiffs enjoyed a Constitutionally-protected liberty interest in  
7 pursuing their chosen occupation or profession of surface mining.

8 197. The Defendants' actions, inactions and statements, as described hereinabove, were  
9 clearly arbitrary and unreasonable as they were undertaken in bad faith, with malice toward, and  
10 with the intent to injure, the Plaintiffs and drive them out of business.

11 198. In many instances, the Defendants' conduct was contrary to state law, their agencies'  
12 own policies and procedures, and to their stated purpose of allegedly protecting the environment  
13 and enforcing the law; and in other instances, their conduct was simply intended to unfairly harm  
14 and punish the Plaintiffs, all of which demonstrates that their conduct was plainly arbitrary and  
15 irrational and lacking any reasonable relation to the public health, safety, morals or general welfare,  
16 and thereby violated the Plaintiffs' right to substantive due process under the Fourteenth  
17 Amendment to the Constitution of the United States and 42 U.S.C. § 1983.

18 199. Indeed, it "shocks the conscious" to see the lengths to which the Defendants have  
19 conspired and coordinated their attacks, all in an attempt to drive the Plaintiffs out of business in  
20 order to provide a political favor for significant campaign donors, i.e, the Competitors, who  
21 perceived an unfair competitive advantage by the Plaintiffs enjoying the legal benefits of a vested  
22 right. Whether looking for the "biggest handle" against the Plaintiffs (rather than worrying about  
23 the environment), issuing cease and desist notices before ever visiting the Property, demoting  
24 inspectors to a "dog catcher" when they had the audacity to admit that no violations existed, sending  
25 in additional inspectors when a large group of inspectors could not initially find any violations,  
26 conducting hearings and revoking vested rights without any notice to the Plaintiffs, conducting  
27 surreptitious inspections even after counsel advised that such inspections were illegal, or expressly  
28 admitting that the conspiracy is not about enforcing the law or protecting the environment, it is truly

1 shocking that a business operator can be scrutinized, inspected, noticed, ordered and fined  
2 completely out of business for doing nothing more than using a Constitutionally-protected vested  
3 right to compete in the market place.

4 200. All of this outrageous conduct was thrust upon the Plaintiffs simply because they  
5 committed the cardinal sin of not contributing enough money to the politicians in charge.

6 201. During the entire time that Defendants undertook the above-referenced conduct, the  
7 law was well-settled to the effect that it is a Constitutional due process violation to treat persons in  
8 an arbitrary, unreasonable and malicious manner with the intent to harass and injure the Plaintiffs  
9 and for no rational or reasonable purpose other than to drive Plaintiffs out of business, which  
10 Defendants have done here as set forth above.

11 202. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an  
12 amount according to proof at trial. The Defendants have used purported police powers under the  
13 color of state law to interfere with the Plaintiffs' business and to stop them from removing already-  
14 processed aggregate, thereby depriving them of a legally-cognizable property interest without the  
15 due process of law. Specifically, by the Defendants conduct, Plaintiffs have been deprived of the  
16 ability to operate their mining business without disruption and to remove and sell material which  
17 they have mined and stockpiled on the Property, and have thus lost customers and sales. Indeed,  
18 Defendants' conduct ultimately forced Plaintiffs to cease mining operations on the Property in  
19 approximately July 2010, and have not conducted such operations at the Property since that time.

20 203. Defendants engaged in such actions maliciously, willfully, and knowingly.  
21 Accordingly, Plaintiffs are entitled to punitive damages.

22 204. Plaintiffs are further entitled to payment of their attorneys' fees pursuant to 42  
23 U.S.C. § 1988.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, the Plaintiffs pray for judgment against the Defendants as follows:  
26 AS TO COUNT ONE:

27 205. For compensatory damages from Defendants SMAQMD, and David Grose in an  
28 amount according to proof at trial;



1           206. For compensatory and punitive damages from Defendant David Grose in an amount  
2 according to proof at trial;

3           207. For attorneys' fees pursuant to 42 U.S.C. § 1988;

4           208. For pre-judgment interest at the appropriate legal rate;

5           209. For the costs of suit incurred herein;

6           210. For such other and further relief as the Court deems just and proper.

7 AS TO COUNT TWO:

8           211. For compensatory and punitive damages from Defendants Bret M. Koehler, Gay  
9 Norris, Steve Testa and Dennis O'Bryant in an amount according to proof at trial;

10          212. For attorneys' fees pursuant to 42 U.S.C. § 1988;

11          213. For pre-judgment interest at the appropriate legal rate;

12          214. For the costs of suit incurred herein;

13          215. For such other and further relief as the Court deems just and proper.

14 AS TO COUNT THREE:

15          216. For compensatory and punitive damages from Defendant Zachary Simmons in an  
16 amount according to proof at trial;

17          217. For attorneys' fees pursuant to 42 U.S.C. § 1988;

18          218. For pre-judgment interest at the appropriate legal rate;

19          219. For the costs of suit incurred herein;

20          220. For such other and further relief as the Court deems just and proper.

21 AS TO COUNT FOUR:

22          221. For compensatory and punitive damages from Defendant Liz Gregory in an amount  
23 according to proof at trial;

24          222. For attorneys' fees pursuant to 42 U.S.C. § 1988;

25          223. For pre-judgment interest at the appropriate legal rate;

26          224. For the costs of suit incurred herein;

27          225. For such other and further relief as the Court deems just and proper.

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1 AS TO COUNT FIVE:

2 226. For compensatory and punitive damages from Defendant Curt Taras in an amount  
3 according to proof at trial;

4 227. For attorneys' fees pursuant to 42 U.S.C. § 1988;

5 228. For pre-judgment interest at the appropriate legal rate;

6 229. For the costs of suit incurred herein;

7 230. For such other and further relief as the Court deems just and proper.

8 AS TO COUNT SIX:

9 231. For compensatory damages from Sacramento County and Robert Sherry in an  
10 amount according to proof at trial;

11 232. For punitive damages from Robert Sherry in an amount according to proof at trial;

12 233. For attorneys' fees pursuant to 42 U.S.C. § 1988;

13 234. For pre-judgment interest at the appropriate legal rate;

14 235. For the costs of suit incurred herein;

15 236. For such other and further relief as the Court deems just and proper.

16 AS TO COUNT SEVEN

17 237. For compensatory damages from Defendants Sacramento County, Cindy Storelli,  
18 and Leighann Moffitt in an amount according to proof at trial;

19 238. For punitive damages from Cindy Storelli and Leighann Moffitt in an amount  
20 according to proof at trial;

21 239. For attorneys' fees pursuant to 42 U.S.C. § 1988;

22 240. For pre-judgment interest at the appropriate legal rate;

23 241. For the costs of suit incurred herein;

24 242. For such other and further relief as the Court deems just and proper.

25 AS TO COUNT EIGHT

26 243. For a ruling overturning the ACE cease and desist orders;

27 244. For attorneys' fees as allowed by the APA or other law;

28 245. For the costs of suit incurred herein;

1           246. For such other and further relief as the Court deems just and proper

2 AS TO COUNT NINE

3           247. For compensatory damages against all Defendants (except ACE) in an amount  
4 according to proof at trial;

5           248. For punitive damages from all Defendants (except ACE and Sacramento County) in  
6 an amount according to proof at trial;

7           249. For attorneys' fees pursuant to 42 U.S.C. § 1988;

8           250. For pre-judgment interest at the appropriate legal rate;

9           251. For the costs of suit incurred herein;

10          252. For such other and further relief as the Court deems just and proper.

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12 DATED: May 10, 2012

ROBERTSON & BENEVENTO  
50 W. Liberty Street, Suite 600  
Reno, NV 89501

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By:           /s/ G. David Robertson            
G. David Robertson, Esq.

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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b) and Local Rule 5-4, I hereby certify that I am an employee of Robertson & Benevento, over the age of eighteen, and not a party to the within action. I further certify that on the 10th day of May, 2012, I electronically filed the **SECOND AMENDED COMPLAINT** and thus, pursuant to LR 135(a), caused same to be served by electronic mail on the following:

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/s/ Laura E. Sutton  
An Employee of Robertson & Benevento