

1 29 U.S.C. § 1132(e)(2), because one or more of the Defendants resides or may be found in this
2 District and/or the breaches alleged took place in this District. Venue is also proper pursuant to
3 28 U.S.C. § 1391(b), in that a substantial part of the events or omissions giving rise to Plaintiffs'
4 claims occurred within this District.

5 **III. PARTIES**

6 3. At all relevant times, Plaintiff JERRY A. VAUGHN ("Mr. VAUGHN"), was a
7 participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the Bay Environmental Pension
8 Plan ("Pension Plan") and the Bay Environmental Retirement Plan ("Retirement Plan").¹ Mr.
9 VAUGHN is a former employee of Defendant BAY ENVIRONMENTAL MANAGEMENT,
10 INC. ("BAY ENVIRONMENTAL"), where he worked for approximately 27 years. He resides
11 in Fairfield, California.

12 4. At all relevant times, Plaintiff THERESA TRAVERS ("Ms. TRAVERS"), was a
13 participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans. Ms. TRAVERS has
14 worked for Defendant BAY ENVIRONMENTAL and its successors for approximately 16 years.
15 She resides in Vacaville, California.

16 5. At all relevant times, the Pension Plan was an employee pension benefit plan
17 within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). It was a Money Purchase
18 Plan, which is an individual account plan under which an employer makes discretionary
19 contributions. The Pension Plan did not allow for participant directed investments.

20 6. At all relevant times, the Retirement Plan was an employee pension benefit plan
21 within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). It was an individual account
22 plan, which consisted of two components: (1) a profit-sharing component, pursuant to which
23 BAY ENVIRONMENTAL made contributions on behalf of each participant, and pursuant to
24 which participants were not allowed to direct investments, and (2) a 401(k) component,
25 pursuant to which employees of BAY ENVIRONMENTAL could elect to have a portion of
26

27 ¹ The Pension Plan and Retirement Plan are hereafter collectively referred to as "the
28 Plans." Participants and beneficiaries of the Plans are hereafter collectively referred to as
"participants."

1 their compensation contributed to the Retirement Plan, and pursuant to which participants
2 directed their own investments.

3 7. At all relevant times, Defendant BAY ENVIRONMENTAL was a California
4 corporation with its principal place of business in Richmond, California. Defendant BAY
5 ENVIRONMENTAL is the Plan sponsor, as defined in ERISA § 3(16)(B), 29 U.S.C. §
6 1002(16)(B), and the Plan Administrator as defined in ERISA § 3(16)(A), 29 U.S.C. §
7 1002(16)(A) of the Plans. Defendant BAY ENVIRONMENTAL is a “named fiduciary” of the
8 Plans. In addition, Plaintiffs are informed and believe, and based thereon allege, that at all
9 relevant times, BAY ENVIRONMENTAL was a fiduciary of the Pension and Retirement Plans
10 within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that it exercised discretionary
11 authority or discretionary control respecting the management of the Pension and/or Retirement
12 Plans and/or exercised authority or control respecting management or disposition of Pension
13 and/or Retirement Plan assets, and/or in that it had discretionary authority or discretionary
14 responsibility in the administration of the Pension and/or Retirement Plans.

15 8. At all relevant times, Defendant CAESAR NUTI (“Mr. NUTI”) was listed as a
16 trustee of the Retirement Plan, and therefore was a “named fiduciary” of the Retirement Plan
17 within the meaning of the Retirement Plan. Plaintiffs are informed and believe, and based
18 thereon allege, that at all relevant times, Mr. NUTI was also a trustee of the Pension Plan. From
19 January 1, 2000, to the date Richmond Sanitary Services was sold to Republic Services, Inc.,
20 Mr. NUTI was a member of the Richmond Sanitary Services Board of Directors and the
21 Richmond Sanitary Services Investment Committee, and a fiduciary of the Plans within the
22 meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that he exercised discretionary authority
23 and/or discretionary control respecting management of either or both of the Plans and/or
24 exercised authority or control respecting management or disposition of either or both of the
25 Plans’ assets, and/or in that he had discretionary authority or discretionary responsibility in the
26 administration of either or both of the Plans.

27 9. At all relevant times, Defendant DENNIS VARNI (“Mr. VARNI”) was listed as
28 a trustee of the Retirement Plan, and therefore was a “named fiduciary” of the Retirement Plan

1 within the meaning of the Retirement Plan. Plaintiffs are informed and believe, and based
2 thereon allege, that at all relevant times, Mr. VARNI was also a trustee of the Pension Plan.
3 From January 1, 2000, to the date Richmond Sanitary Services was sold to Republic Services,
4 Inc., Mr. VARNI was a member of the Richmond Sanitary Services Board of Directors and the
5 Richmond Sanitary Services Investment Committee, and a fiduciary of the Plans within the
6 meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that he exercised discretionary authority
7 and/or discretionary control respecting management of either or both of the Plans and/or
8 exercised authority or control respecting management or disposition of either or both of the
9 Plans' assets, and/or in that he had discretionary authority or discretionary responsibility in the
10 administration of either or both of the Plans.

11 10. Defendants Mr. NUTI and Mr. VARNI are referred to herein as "Trustees."

12 11. From January 1, 2000, to the date Richmond Sanitary Services was sold to
13 Republic Services, Inc. (approximately May 23, 2001), Defendant MARIO AQUILINO ("Mr.
14 AQUILINO") was a member of the Richmond Sanitary Services Board of Directors and the
15 Richmond Sanitary Services Investment Committee. From January 1, 2000, to the date
16 Richmond Sanitary Services was sold to Republic Services, Inc., Mr. AQUILINO was a
17 fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that he
18 exercised discretionary authority and/or discretionary control respecting management of either
19 or both of the Plans and/or exercised authority or control respecting management or disposition
20 of either or both of the Plans' assets, and/or in that he had discretionary authority or
21 discretionary responsibility in the administration of either or both of the Plans.

22 12. From January 1, 2000, to the date Richmond Sanitary Services was sold to
23 Republic Services, Inc. (approximately May 23, 2001), Defendant LOYD BONFANTE SR.
24 ("Mr. BONFANTE") was a member of the Richmond Sanitary Services Board of Directors and
25 the Richmond Sanitary Services Investment Committee. From January 1, 2000, to the date
26 Richmond Sanitary Services was sold to Republic Services, Inc., Mr. BONFANTE was a
27 fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that he
28 exercised discretionary authority and/or discretionary control respecting management of either

1 or both of the Plans and/or exercised authority or control respecting management or disposition
2 of either or both of the Plans' assets, and/or in that he had discretionary authority or
3 discretionary responsibility in the administration of either or both of the Plans.

4 13. From January 1, 2000, to the date Richmond Sanitary Services was sold to
5 Republic Services, Inc. (approximately May 23, 2001), Defendant JOSEPH DELLA ZOPPA
6 ("Mr. DELLA ZOPPA") was a member of the Richmond Sanitary Services Board of Directors.
7 From January 1, 2000, to the date Richmond Sanitary Services was sold to Republic Services,
8 Inc., Mr. DELLA ZOPPA was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29
9 U.S.C. § 1002(21), in that he exercised discretionary authority and/or discretionary control
10 respecting management of either or both of the Plans and/or exercised authority or control
11 respecting management or disposition of either or both of the Plans' assets, and/or in that he
12 had discretionary authority or discretionary responsibility in the administration of either or both
13 of the Plans.

14 14. From January 1, 2000, to the date Richmond Sanitary Services was sold to
15 Republic Services, Inc. (approximately May 23, 2001), Defendant RICHARD GRANZELLA
16 SR. ("Mr. GRANZELLA") was a member of the Richmond Sanitary Services Board of
17 Directors and the Richmond Sanitary Services Investment Committee. From January 1, 2000, to
18 the date Richmond Sanitary Services was sold to Republic Services, Inc., Mr. GRANZELLA
19 was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that
20 he exercised discretionary authority and/or discretionary control respecting management of
21 either or both of the Plans and/or exercised authority or control respecting management or
22 disposition of either or both of the Plans' assets, and/or in that he had discretionary authority or
23 discretionary responsibility in the administration of either or both of the Plans. Mr.
24 GRANZELLA is deceased and his estate is named in his place.

25 15. From January 1, 2000, to the date Richmond Sanitary Services was sold to
26 Republic Services, Inc. (approximately May 23, 2001), Defendant EDWARD MENOSSE ("Mr.
27 MENOSSE") was a member of the Richmond Sanitary Services Board of Directors. From
28 January 1, 2000, to the date Richmond Sanitary Services was sold to Republic Services, Inc.,

1 Mr. MENOSSE was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. §
2 1002(21), in that he exercised discretionary authority and/or discretionary control respecting
3 management of either or both of the Plans and/or exercised authority or control respecting
4 management or disposition of either or both of the Plans' assets, and/or in that he had
5 discretionary authority or discretionary responsibility in the administration of either or both of
6 the Plans.

7 16. From January 1, 2000, to the date Richmond Sanitary Services was sold to
8 Republic Services, Inc. (approximately May 23, 2001), Defendant PASQUALE PARENTI
9 ("Mr. PARENTI") was a member of the Richmond Sanitary Services Board of Directors. From
10 January 1, 2000, to the date Richmond Sanitary Services was sold to Republic Services, Inc.,
11 Mr. PARENTI was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. §
12 1002(21), in that he exercised discretionary authority and/or discretionary control respecting
13 management of either or both of the Plans and/or exercised authority or control respecting
14 management or disposition of either or both of the Plans' assets, and/or in that he had
15 discretionary authority or discretionary responsibility in the administration of either or both of
16 the Plans.

17 17. Plaintiffs first learned about Defendants Mssrs. AQUILINO, BONFANTE, and
18 GRANZELLA, their roles as members of the Richmond Sanitary Services Board of Directors
19 and the Richmond Sanitary Services Investment Committee, and their status as fiduciaries to the
20 Plans through Defendants' Responses to Plaintiffs' First Set of Requests for Admission to
21 Defendants Bay Environmental Management Inc., Caesar Nuti, and Dennis Varni, dated August
22 21, 2009.

23 18. Plaintiffs first learned about Defendants Mssrs. DELLA ZOPPA, MENOSSE,
24 and PARENTI, their roles as members of the Richmond Sanitary Services Board of Directors,
25 and their status as fiduciaries to the Plans through Defendants' Responses to Plaintiffs' First Set
26 of Requests for Admission to Defendants Bay Environmental Management Inc., Caesar Nuti,
27 and Dennis Varni, dated August 21, 2009.

28 19. Plaintiffs are informed and believe, and based thereon allege, that the members

1 of the Richmond Sanitary Services Board of Directors exercised discretion with respect to
2 management of the Plans' assets and investments.

3 20. Plaintiffs are informed and believe, and based thereon allege, that the members
4 of the Richmond Sanitary Services Board of Directors Investment Committee exercised
5 discretion with respect to management of the Plans' assets and investments.

6 21. Defendants BAY ENVIRONMENTAL, the Trustees, Mssrs. AQUILINO,
7 BONFANTE, DELLA ZOPPA, GRANZELLA, MENOSE, and PARENTI are collectively
8 referred to herein as "the BAY ENVIRONMENTAL DEFENDANTS."

9 22. Plaintiffs are informed and believe, and based thereon allege, that, at all relevant
10 times, FSC SECURITIES CORPORATION was a fiduciary of the Plans within the meaning of
11 ERISA § 3(21), 29 U.S.C. § 1002(21).

12 23. Plaintiffs are informed and believe, and based thereon allege, that, at all relevant
13 times, Defendant JERROLD N. WEINBERG ("Mr. WEINBERG") was a fiduciary of the Plans
14 within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

15 24. Plaintiffs first learned about Defendant FSC SECURITIES CORPORATION, its
16 role as an investment advisor to the Plans, and its status as fiduciary to the Plans through
17 documents produced in this litigation in 2004-2005.

18 25. Plaintiffs first learned about Defendant Mr. WEINBERG, his role as an
19 investment advisor to the Plans, and his status as fiduciary to the Plans through documents
20 produced in this litigation in 2004-2005.

21 **IV. FACTS**

22 **A. The Retirement Plan.**

23 26. BAY ENVIRONMENTAL established the Retirement Plan effective
24 January 1, 1984.

25 27. Mechanics Bank, Defendant Mr. NUTI, and/or Defendant Mr. VARNI became
26 trustees of the Retirement Plan at least as early as January 1, 1991. Mechanics Bank, Mr. NUTI,
27 and Mr. VARNI signed as the trustees of the Retirement Plan in the Retirement Plan's amended
28 adoption agreement, which was executed on or about September 5, 1991.

1 28. Mechanics Bank was removed as trustee of the Retirement Plan on or about May
2 21, 1998.

3 29. The IRS Form 5500s filed by the Retirement Plan for the years 1999, 2000, 2001,
4 and 2002 all list Mr. NUTI and Mr. VARNI as trustees of the Retirement Plan.

5 30. An IRS Application for Determination for Terminating Plan filed by the
6 Retirement Plan on or about January 18, 2002, lists Mr. NUTI and Mr. VARNI as trustees of the
7 Retirement Plan.

8 31. As of January 18, 2002, there were 101 participants in the Retirement Plan.

9 **B. The Pension Plan.**

10 32. BAY ENVIRONMENTAL established the Pension Plan effective January 1,
11 1991.

12 33. Mechanics Bank was elected trustee of the Pension Plan in a BAY
13 ENVIRONMENTAL Board of Directors meeting held on or about September 5, 1991.

14 34. Mechanics Bank signed as the trustee of the Pension Plan in the Pension Plan's
15 adoption agreement, which was executed on or about September 5, 1991.

16 35. On or about May 21, 1998, Mechanics Bank was removed as a trustee of the
17 Pension Plan.

18 36. The IRS Form 5500s filed by the Pension Plan for the years 1999, 2000, 2001,
19 and 2002 all list Mr. NUTI and Mr. VARNI as trustees of the Pension Plan.

20 37. A Power of Attorney and Declaration of Representative Form submitted with the
21 IRS Application for Determination for Terminating Plan filed by the Pension Plan on or about
22 January 18, 2002 is signed by Mr. NUTI as trustee.

23 38. On or about February 12, 2002, the Trustees of the Bay Environmental Pension
24 Plans sent a Memo addressed to All Pension Plan Participants, in which Mr. NUTI and Mr.
25 VARNI were all listed as trustees for the Pension Plan.

26 39. As of January 18, 2002, there were 99 participants in the Pension Plan.

27 **C. Additional Facts**

28 40. Plaintiffs are informed and believe that at all relevant times, no written

1 investment policy statement was adopted for the Plans.

2 41. Plaintiffs are informed and believe that during the year 2000 or early 2001,
3 Republic Services, Inc. ("Republic") purchased Richmond Sanitary Services, Inc. ("RSS"), of
4 which BAY ENVIRONMENTAL was an affiliate.

5 42. Plaintiffs are informed and believe that during the year 2000 or early 2001 the
6 Trustees voted to terminate BAY ENVIRONMENTAL's Pension and Retirement Plans.

7 43. On or about April 13, 2001, BAY ENVIRONMENTAL notified its employees
8 that the Plans would be terminated effective April 30, 2001.

9 44. BAY ENVIRONMENTAL filed Determination Letter Requests for each Plan
10 with the IRS on or about January 18, 2002.

11 45. Plaintiffs are informed and believe, and based thereon allege, that negotiations
12 for the sale of RSS and its affiliates, including BAY ENVIRONMENTAL, began in the year
13 2000 or earlier.

14 46. Plaintiffs are informed and believe, and based thereon allege, that the fiduciaries
15 of the Plans knew or should have known that the purchase of BAY ENVIRONMENTAL by
16 RSS would likely result in the termination of the Plans.

17 47. The Plans each provide that the Trustees shall at all times in making investments
18 consider the short and long-term financial needs of the Plan.

19 48. Plaintiffs are informed and believe, and based thereon allege, that Defendants,
20 and each of them, failed to adjust the Plans' investments to reflect the likelihood that the Plans
21 would terminate shortly.

22 49. On or about February 12, 2002, the Trustees of the Bay Environmental Pension
23 Plans sent a Memo addressed to All Pension Plan Participants. The Memo referred to assets of
24 the Pension and Retirement Plans as the plan assets. The Memo informed participants that in
25 August 2001 the Trustees transferred all non-participant-directed plan assets to money market
26 funds.

27 50. Plaintiffs are informed and believe, and based thereon allege, that the Plans lost a
28 significant amount of assets due to the delay in transferring the Plans' non-participant-directed

1 assets to appropriate investments once Defendants, and each of them, knew or should have
2 known that the Plans would likely terminate.

3 51. At all relevant times, the BAY ENVIRONMENTAL DEFENDANTS, and each
4 of them, failed to adequately monitor the performance of the Plans' investment advisors.

5 52. At all relevant times, the BAY ENVIRONMENTAL DEFENDANTS, and each
6 of them, failed to adequately monitor the performance of the Plans' investments.

7 53. The BAY ENVIRONMENTAL DEFENDANTS, and each of them, failed to
8 conduct an adequate investigation in selecting FSC SECURITIES CORPORATION and/or Mr.
9 WEINBERG as investment advisors to the Plans.

10 54. Plaintiffs are informed and believe, and based thereon allege, that the Plans lost
11 assets due to imprudent investments by Defendants, and each of them, and/or due to a failure by
12 Defendants to diversify the Plans' investments.

13 55. The Pension Plan's 2000 Form 5500 filing with the IRS reflects that total plan
14 assets at the beginning of the year were \$5,409,691, and total plan assets at the end of the year
15 were \$4,679,258, after taking into account \$394,013 in employer contributions, and \$234,225 in
16 benefits paid.

17 56. The Pension Plan's 2001 Form 5500 filing with the IRS reflects that total plan
18 assets at the beginning of the year were \$4,679,258, and total plan assets at the end of the year
19 were \$4,165,549, after taking into account \$157,118 in employer contributions, and \$39,034 in
20 benefits paid.

21 57. The Retirement Plan's 2000 Form 5500 filing with the IRS reflects that total plan
22 assets at the beginning of the year were \$18,317,879, and total plan assets at the end of the year
23 were \$15,340,335, after taking into account \$338,268 in employer contributions, \$303,825 in
24 participant contributions, and \$918,094 in benefits paid.

25 58. The Retirement Plan's 2001 Form 5500 filing with the IRS reflects that total plan
26 assets at the beginning of the year were \$15,340,335, and total plan assets at the end of the year
27 were \$13,259,021, after taking into account \$134,398 in employer contributions, \$122,406 in
28 participant contributions, and \$340,005 in benefits paid.

1 **V. CLASS ALLEGATIONS**

2 59. The Plaintiffs bring a Claim for Relief on behalf of themselves, the
3 Pension and Retirement Plans, and, pursuant to Fed. R. Civ. P. 23, all participants in the
4 Pension and Retirement Plans from January 1, 2000 through the final date on which the Pension
5 Plan's assets were transferred entirely to interest bearing investments, excluding any participants
6 or beneficiaries who are named as defendants in this action.

7 60. The requirements of Fed. R. Civ. P. 23(a)(1) are satisfied in that there are
8 too many class members for joinder of all of them to be practicable. As of January 18, 2002,
9 there were 99 participants in the Pension Plan and 101 participants in the Retirement Plan.

10 61. Because the class members' claims concern the Defendants' actions with respect
11 to the Pension and Retirement Plans and their participants as a whole, the class members' claims
12 raise numerous common issues of fact and law, thereby satisfying the requirements of Fed. R.
13 Civ. P. 23(a)(2). The class members' claims raise the following common issue, which is a
14 mixed question of fact and law, as follows: Did Defendants breach their fiduciary duty imposed
15 by ERISA and in light of the terms of the Plans by investing the Plans' assets imprudently and
16 by related acts and omissions?

17 62. The requirement of Rule 23(a)(3) of Fed. R. Civ. P. 23(a)(3) is satisfied in that
18 the claims of Plaintiffs VAUGHN and TRAVERS are typical of the claims of class members, in
19 that each Plaintiff had substantial assets invested in the Plans during the relevant time period.

20 63. Each of the Plaintiffs is an adequate representative of the class, and therefore
21 satisfies the requirements of Fed. R. Civ. P. 23(a)(4). The Defendants have no unique defenses
22 against any of these Plaintiffs that would interfere with representation of the class. Each of the
23 Plaintiffs is in good health and willing to represent the class. Together they have engaged
24 counsel with many years of litigation experience, including in ERISA class action litigation.

25 64. The requirements of Fed. R. Civ. P. 23(b)(1) are satisfied, in that the prosecution
26 of separate actions by individual class members would create a risk of inconsistent adjudications
27 that would require Defendants to follow incompatible courses of conduct. For example, the
28 Defendants would not be able to act consistently if their investments are declared imprudent in

1 one case but not another. Additionally, Fed. R. Civ. P. 23(b)(1) is also satisfied in that the
2 prosecution of separate actions by individual class members would create a risk of adjudications
3 that would as a practical matter be dispositive of other members' interests or impair or impede
4 the other members' ability to protect their interests. For example, if one plaintiff litigated
5 against Defendants and received an unfavorable decision, Defendants could invoke defensive
6 collateral estoppel and res judicata against subsequent plaintiffs, assuming subsequent plaintiffs
7 were found to be in privity with the first plaintiff. Thus, subsequent plaintiffs would effectively
8 be bound by the first plaintiff's unfavorable decision, but would not have the opportunity to
9 avail themselves of the protections provided by Fed. R. Civ. P. 23's procedural safeguards.

10 65. Alternatively, the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in
11 that the Defendants have acted on grounds generally applicable to the class, thereby making
12 appropriate final declaratory and injunctive relief with respect to the class as a whole. For
13 example, the Plaintiffs seek with respect to the class as a whole a declaration that the investment
14 of the Plans' assets was imprudent and that the Defendants breached their fiduciary duties by so
15 investing. Plaintiffs also seek with respect to the class as a whole an Order that Defendants
16 make good to the Plans and/or to successor trusts the losses resulting from their breaches.

17 66. Alternatively, the requirements of Fed. R. Civ. P. 23(b)(3) are satisfied, in that a
18 common issue of fact and law – whether, given the duties imposed by ERISA and in light of the
19 terms of the Plans, Defendants breached their fiduciary duties by imprudently investing the
20 Plans' assets and by related acts and omissions – predominates over any issues affecting only
21 individual members. A class action is superior to other available methods for the fair and
22 efficient adjudication of this dispute because the Plans require that interpretation of the Plans'
23 terms “shall be done in a nondiscriminatory manner based upon uniform principles consistently
24 applied.”

25 **VI. FIRST CLAIM FOR RELIEF: Claim for Breach of Fiduciary Duty Against All**
26 **Defendants**
[ERISA §§ 404(a)(1), 409, 502(a)(2), 29 U.S.C. §§ 1104(a)(1), 1109, 1132(a)(2)]

27 67. Plaintiffs incorporate Paragraphs 1 through 66, above, as though fully set forth
28 herein.

1 68. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires, *inter alia*, that a plan
2 fiduciary discharge his or her duties with respect to a plan solely in the interest of the
3 participants and beneficiaries and (1) with the care, skill, prudence, and diligence under the
4 circumstances then prevailing that a prudent person acting in a like capacity and familiar with
5 such matters would use in the conduct of an enterprise of a like character and with like aims; (2)
6 by diversifying the investments of the plan so as to minimize the risk of large losses; (3) in
7 accordance with 29 C.F.R. § 2550.404a-1(a), which provides that a fiduciary must act with the
8 “skill, prudence, and diligence under the circumstances then prevailing that a prudent man
9 acting in a like capacity and familiar with such matters would use; and (4) in accordance with 29
10 C.F.R. § 2550 404a-1(b), which provides that a fiduciary must take into account the “facts and
11 circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or
12 should know are relevant to the particular investment or investment course of action involved.”

13 69. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a
14 fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or
15 duties imposed on fiduciaries by Title 1 of ERISA shall be personally liable to make good to the
16 plan any losses to the plan resulting from each such breach, and additionally is subject to such
17 other equitable or remedial relief as the court may deem appropriate, including removal of the
18 fiduciary.

19 70. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring a
20 suit for relief under ERISA § 409.

21 71. Defendants, and each of them, have breached their fiduciary duties of prudence
22 and/or loyalty by acts and omissions including but not limited to investing the Plans’ assets
23 imprudently, and/or and failing to sufficiently take into account the Plans’ shortened investment
24 horizons.

25 72. Plaintiffs are informed and believe, and based thereon allege, that as a result of
26 Defendants’ breaches, the Plans have suffered losses which Defendants, and each of them, are
27 liable to restore to the Plans.

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1 **VII. SECOND CLAIM FOR RELIEF: Claim for Breach of Fiduciary Duty Against the**
2 **BAY ENVIRONMENTAL DEFENDANTS, and each of them.**
3 **[ERISA §§ 404(a)(1), 409, 502(a)(2), 29 U.S.C. §§ 1104(a)(1), 1109, 1132(a)(2)]**

3 73. Plaintiffs incorporate Paragraphs 1 through 72, above, as though fully set forth
4 herein.

5 74. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires, *inter alia*, that a plan
6 fiduciary discharge his or her duties with respect to a plan solely in the interest of the
7 participants and beneficiaries and (1) with the care, skill, prudence, and diligence under the
8 circumstances then prevailing that a prudent person acting in a like capacity and familiar with
9 such matters would use in the conduct of an enterprise of a like character and with like aims; (2)
10 by diversifying the investments of the plan so as to minimize the risk of large losses; (3) in
11 accordance with 29 C.F.R. § 2550.404a-1(a), which provides that a fiduciary must act with the
12 “skill, prudence, and diligence under the circumstances then prevailing that a prudent man
13 acting in a like capacity and familiar with such matters would use; and (4) in accordance with 29
14 C.F.R. § 2550 404a-1(b), which provides that a fiduciary must take into account the “facts and
15 circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or
16 should know are relevant to the particular investment or investment course of action involved.”

17 75. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a
18 fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or
19 duties imposed on fiduciaries by Title 1 of ERISA shall be personally liable to make good to the
20 plan any losses to the plan resulting from each such breach, and additionally is subject to such
21 other equitable or remedial relief as the court may deem appropriate, including removal of the
22 fiduciary.

23 76. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring a
24 suit for relief under ERISA § 409.

25 77. The BAY ENVIRONMENTAL DEFENDANTS, and each of them, have
26 breached their fiduciary duties of prudence and/or loyalty by acts and omissions including but
27 not limited to failing to adequately monitor the performance of the Plans’ investment advisors,
28 and/or failing to adequately monitor the performance of the Plans’ investments; and/or failing to

1 conduct an adequate investigation in selecting FSC SECURITIES CORPORATION and/or Mr.
2 WEINBERG as investment advisors to the Plans

3 78. Plaintiffs are informed and believe, and based thereon allege, that as a result of
4 Defendants' breaches, the Plans have suffered losses which the BAY ENVIRONMENTAL
5 DEFENDANTS, and each of them, are liable to restore to the Plans.

6
7 **PRAYER FOR RELIEF**

8 Wherefore, Plaintiffs pray as follows:

9 A. Declare that Defendants, and each of them, have breached their duties to the
10 Plans' participants and beneficiaries;

11 B. Issue a preliminary injunction prohibiting distribution of the accounts of the
12 individual Defendants from each Plan until such time as Plaintiffs' claims against them have
13 been finally adjudicated;

14 C. Order the establishment of a successor trust for benefits owing to participants and
15 beneficiaries whose Plan accounts have been distributed;

16 D. Order that Defendants, and each of them, make good to each Plan and/or to a
17 successor trust the losses resulting from their breaches, including, but not limited to, by
18 forfeiting their Plan accounts, if any;

19 E. Award Plaintiffs their attorneys' fees and costs pursuant to ERISA § 502(g), 29
20 U.S.C. § 1132(g); and

21 F. Award such other and further relief as the Court deems equitable and just.

22
23 Dated: 9/2/09

Respectfully submitted,

24 LEWIS, FEINBERG,
25 RENAKER & JACKSON, P.C.

26 By: 
27 Lindsay Mako
28 Attorneys for Plaintiffs