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MACKIE vs LOUNSBERY



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12
New York Supreme Court. 1

ROBERT J. D. MACKIE

AGST.

RICHARD P. LOUNSBERY AND
BEN Ali Haggin, James B.
Haggin, and Wells, Fargo &
Co.

2

The defendant James B. Haggin, by this answer to the first cause of action in the complaint herein alleged, avers and alleges :

1. This defendant admits the allegations of the first section or subdivision of the complaint except that he denies that he is or has been a director or vice-president of the defendant, Wells, Fargo & Co., since the eighth day of September, 3 1879.

2. This defendant denies on his information and belief, each and every allegation contained in the second section or subdivision of the complaint, except that he admits that the defendant, Wells, Fargo & Co., is a corporation created and existing under and by virtue of the laws of Colorado, and was at the times mentioned in the complaint and is authorized among other things to

- 4 buy, sell and dispose of gold or silver coin and bullion, gold dust, money, and securities for money; and except that this defendant has no knowledge or information sufficient to form a belief as to whether or not the said corporation stated or represented or advertised in the City of New York or elsewhere, that a principal part, or any part of its business was to buy and sell, or was to buy or sell mining stocks and other Pacific Coast securities, or any such securities whatsoever, or as to what statements or representations, if any, said corporation has made in the City of New York or elsewhere relative to the buying or selling of mining stocks or other Pacific Coast securities; and
- 5 except that this defendant admits that the principal place of business of said corporation defendant was at and in the City of San Francisco at the times mentioned in the complaint, and that the said corporation had a place for the transaction of business, at and in the City of New York, and that it carried on a large part of its business thereat, and that said business at said City of New York was in the charge and under the management of Hosmer B. Parsons, who was, at the times mentioned in the complaint, the assistant secretary of said defendant corporation, and the chief executive officer thereof, at and in the said City of New York.
- 6 3. This defendant denies each and every allegation contained in the third section or subdivision of the complaint, except that he admits that during the times mentioned in the complaint, the Excelsior Water and Mining Company was, and still is, a corporation duly created and existing under and by virtue of the Laws of the State of California, and that it was incorporated thereunder on or about March 9, 1877, and that the place where its principal business was to be transacted was to be and was the City and County of San Francisco and State of California; and except that this defendant admits that the number of directors or trustees of

said corporation was to be and was five, and that 7
all the officers of said company, except the assistant
secretary thereof, at the times mentioned in the
complaint, were citizens and residents of said State
of California, and that at the date of its said incor-
poration, its capital stock was fixed at five millions
of dollars, divided into fifty thousand shares, of
one hundred dollars each; and except that this
defendant has no knowledge or information suf-
ficient to form a belief as to whether or not at
the time of its incorporation said company issued
about 36,464 shares of its said stock, or as to how
many shares of its said stock, if any, it issued, or
whether or not from time to time thereafter it issued 8
other shares thereof, so that on the fifteenth
day of May, 1879, 43,326 shares of the said stock,
or any other number of shares thereof, had been
issued or were then outstanding, or whether or
not the same were of the par value of \$4,332,600,
or any other sum; and except that this defendant
admits that all the votes, acts, and resolutions of
said company, during the times mentioned in the
complaint, were made, passed, and enacted at
meetings of the said company or of its directors
or trustees, held within said State of California.

4. This defendant denies that during the year
1879, or thereafter, or at any time, the defendants
or either or any of them wrongfully or fraudulent- 9
ly, or otherwise, conspired with the or any of the
directors, officers, stock-holders or employees of
the said Excelsior Company, or with any person
or persons whomsoever, to obtain the possession or
control of said Excelsior Company, or for any
other purpose; and this defendant, denies that
this defendant, or the other defendants herein, or
either or any of them, wrongfully or fraudulently
or otherwise conspired with any person or persons
whomsoever, for the purpose of procuring an in-
crease of the capital stock of said Excelsior
Company, or of obtaining the control of the or

10 any stock of said company, or of selling or disposing of the said stock or any thereof, at a price beyond its real or intrinsic value, or at any price, to plaintiff or to plaintiff's alleged assignors, or to any person or persons, or to depress the price of said stock in the market, or to repossess themselves of said stock, or to control said company, or to defraud those who had or might become purchasers of said stock, or for any purpose or purposes whatever.

This defendant denies each and every allegation contained in the fourth section or subdivision of the complaint except that he admits that in or about the month of April, 1879, this defendant and the

11 defendants Lounsbery & Haggin procured and obtained from certain persons then owning part of the capital stock of said Excelsior Company, options or calls thereon, whereby the said owners of said capital stock in substance agreed to sell and deliver to said defendants Lounsbery & Haggin, and this defendant, or their appointees, about 67,000 shares of said stock upon request and demand, at a price or sum in said options agreed upon, and that thereafter, but subsequent to June 5, 1879, this defendant, and the defendants, Lounsbery & Haggin, from time to time, exercised their said options and purchased said stock, in sundry lots amounting in the aggregate

12 to to wit: about 67,000 shares; and except that this defendant has no knowledge or information sufficient to form a belief as to whether or not the person or persons from whom said options or calls were obtained, then owned the principal part of said capital stock; and except that this defendant admits that on or about May 15, 1879, the original capital stock of said Excelsior company was, by the Board of Trustees of said company, voted to be and was increased from \$5,000,000, divided into 50,000 shares, to \$10,000,000, divided into 100,000 shares of the par value of \$100 each, and also that two of

said new shares of stock were thereafter issued for each one of the old shares of stock then outstanding; and except that this defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not 13,348 shares of the capital stock of said Excelsior Company, or any other number of shares of said capital stock, were, on or about June 5, 1879, or at any other time, issued or divided among the then stockholders of said company, pro rata, or otherwise. 13

And this defendant particularly denies each and every allegation of said section or subdivision of the complaint herein charging or tending to charge, or attempting or purporting to charge this defendant with any fraud or wrong, or fraudulent or illegal or other combination or conspiracy. 14

5. This defendant denies each and every allegation of the fifth section or subdivision of the complaint, except that he admits that he sold large amounts of the new stock of said Excelsior Company in the City of New York and elsewhere, through the defendants Lounsbery & Haggin; and except that he admits that the firm of Lounsbery & Haggin stated they had for sale, and bought and sold, certain stock of said Excelsior Company, in the City of New York and elsewhere; and except that this defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not said Lounsbery & Haggin, or either of them, made, or caused to be made the or any of the statements or representations in said fifth section or subdivision of the complaint alleged to have been made, or to have been caused to be made by the defendants Lounsbery & Haggin, or either of them, save and except the representations hereinabove in this subdivision of this answer admitted; and except that this defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not books for public subscriptions for the stock of said 15

- 16 Excelsior Company were opened at the said New York office of said defendant corporation Wells, Fargo & Co.; and except that this defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not the defendant Wells, Fargo & Co. made or caused to be made the, or any of the statements or representations in said fifth section or subdivision of the complaint alleged to have been made, or to have been caused to be made, by said defendant Wells, Fargo & Co., or as to what statements or representations, if any, were made or caused to be made by said defendant Wells, Fargo & Co.; and except that this defendant alleges that he
- 17 has no knowledge or information sufficient to form a belief as to whether or not the defendant, Wells, Fargo & Co., received the whole or any part of the amounts paid for any subscriptions to any stock of said Excelsior Company, or whether or not said Wells, Fargo & Co. bought or sold, or pretended to buy or sell, any of said stock, or held or exchanged, or transferred any thereof, or whether or not the defendants Lounsbury & Haggin and Wells, Fargo & Co., or either, or any of them, loaned any sum or sums of money upon said stock, upon margin, or otherwise; and except that he denies on his information and belief, that said Lounsbury & Haggin and said Wells, Fargo & Co., or either, or
- 18 any of them, made any false or pretended sales of said stock; and except that this defendant admits that the office of the said Excelsior Company for transfers of its stock, the payment of dividends, and the receipt of the assessments upon its stock, was at the office of said Wells, Fargo & Co., and continued to be so until in or about the month of April, 1882; but this defendant alleges, on his information and belief, that said Wells, Fargo & Co. was not at any time the agent of said Excelsior Company, and did not at any time represent or act for the said Excelsior Company in the transfer of its stock, the payment

of dividends, or the receipt of assessments upon 19
its stock.

6. This defendant denies each and every allegation of the sixth section or subdivision of the complaint, except that he admits that a report was made by Louis Janin, mining engineer, of the Excelsior Water and Mining Company, before the purchase by these defendants, or any of them, of any of the stock of said Excelsior Company, and before these defendants, or any of them, had any connection whatever with said Excelsior Company, which said report stated that said Janin had made an estimate of the probable product of the mines of said Excelsior Company, and that his estimate of such probable product was \$646,580 per annum; and which report also stated that the said Janin had made an estimate of the cost of working the said mines, and that he estimated the annual cost of working the said mines to be \$200,000, and which said report contained the further statement that the said Janin had estimated the net profit to be derived from the mines of said company, and that he estimated the same to be at least \$400,000 per annum, and which said report also contained a statement made by the said Janin that the bonded debt of said company amounted to the sum of \$250,000, bearing interest at the rate of 10 per cent. per annum, and that said debt was to be paid in installments of \$50,000 per annum, and which said report also contained a statement that the said Janin had made an estimate of the probable revenues of the said Excelsior Company after its mining operations should have finally ceased, and that he estimated the probable revenues from sales of water and of merchandise and from rents and earnings of the farm to be at least \$100,000 per annum. 20

This defendant alleges on his information and belief, that said report of said Janin was afterwards printed in pamphlet form and given to pur- 21

22 chasers of said stock in said city of New York.

7. This defendant denies each and every allegation of the seventh section or subdivision of the complaint except that he admits that the hydraulic process is the only process by which the mines of said Excelsior Company could or can be profitably worked; and except that he admits that on or about the 25th day of May, 1881, said Excelsior Company was by certain legal proceedings in the Courts of California, enjoined from so working its said mines as to deposit in, or suffer to flow therefrom into the Yuba River or its tributaries, what is commonly called "mining debris," to wit: earth, sand, gravel,
 23 muddy water, etc.; and that thereafter said company was likewise so enjoined by certain other proceedings in the Circuit Court of the United States.

8. This defendant denies each and every allegation of the eighth section or subdivision of the complaint, except that he admits that on or about the eighth day of July, 1879, this defendant was appointed by the Board of Directors or Trustees of said Excelsior Company, a trustee of said company to fill a vacancy then existing in said board, and that he was subsequently, to wit, on or about December 11, 1879, elected vice-president thereof, and that he continued to be such vice-president
 24 until on or about the 15th day of March, 1881; and this defendant alleges that the Board of Directors or Trustees by which this defendant was so appointed a trustee, was a board which had been elected prior to the purchase by these defendants, or any of them, of any stock in said company, and prior to any connection by any of these defendants therewith.

9. This defendant denies each and every allegation contained in that portion of the ninth section or subdivision of the complaint included in folios 35, 36, and 37, and down to the figures

“ \$600,000 ” in folio 38, except that he admits, and 25
upon his information and belief alleges that in or
about the month of October, 1879, said Excelsior
Company by and through said defendant Lounsbury,
who then was and ever since has been a member
of the Stock Exchange in the City of New York,
applied at said Stock Exchange to place upon
the list of the money securities dealt in thereat,
the shares of the capital stock of said Excelsior
Company, and that for that purpose the said
Excelsior Company made and delivered to and
filed with the said Stock Exchange a statement
which was and purported to be an official state-
ment of the said Excelsior Company; and except 26
that this defendant has no knowledge or informa-
tion sufficient to form a belief as to whether or
not said statement was verified by said Parsons,
acting, or claiming to act, as assistant secretary
of said Excelsior Company, or otherwise; and ex-
cept that this defendant has no knowledge or infor-
mation sufficient to form a belief as to what
statements or representations were contained in
said statement, or as to whether or not said
statement stated or represented that the tun-
nels, ditches, pipes, flumes and machinery of said
Excelsior Company had cost the sum of \$1,802,-
542, or that the receipts from the said property
prior to the organization of said company had
been the sum of \$6,059,000, or that the receipts 27
of said company from its organization on March
9, 1879, to October 1, 1879, had been the sum of
\$907,000, or that said company then had cash on
hand (bullion), to the amount of \$12,294, or that
the floating debt of said company amounted to the
sum of \$25,000, or that the amount expended in
improvements and underground improvements on
the property of said company had been \$2,500,000;
or that the said capital stock of said company was
\$10,000,000 stock assessable, and had been fully
paid for its said property by said company, or that
the dividends already paid amounted to the sum

28 of \$600,000, or that the New York office of said company was at the office of said Lounsbery & Haggin in New York city, or that the office of said company for the transfer of its stock and the payment of its dividends was at said New York office of said defendant, Wells, Fargo & Co.

This defendant denies on his information and belief each and every allegation contained in that portion of the ninth section or subdivision of the complaint commencing with the word "whereas" on line 2, folio 38, and terminating with the word "thereabouts" on line 4, folio 41, except that this defendant denies that he at any time knew the or
 29 any of the alleged facts, set forth in said last mentioned portion of said section or subdivision nine, to be facts.

This defendant denies each and every allegation of the ninth section or subdivision of the complaint contained in folios 42 and 43, except that he admits that the said Stock Exchange did on or about November 13, 1879, admit the said stock of said Excelsior Company to be listed as one of the securities regularly dealt in at said Exchange, and that since that time, said stock has been, from time to time, publicly bought and sold at said Stock Exchange; and except that he admits that prior to March 1, 1882, the defendants Lounsbery & Haggin, and this defendant through the defend-
 30 ants Lounsbery & Haggin, sold to various persons certain shares of the stock of said Excelsior Company; and except that he has no knowledge or information sufficient to form a belief as to whether or not prior to March 1, 1882, or at any other time or times said defendants sold or disposed of 84,088 shares or thereabouts, of the stock of said Excelsior Company, or as to whether or not said defendants or any of them at any time sold or disposed of any of said stock whatsoever to plaintiff and his alleged assignors or to either or any of them.

10. This defendant denies each and every allegation of the 10th section or subdivision of the complaint except that he admits that fourteen dividends in number were voted, declared, made payable and paid by the Board of Trustees of said Excelsior Company, and were made payable and paid at the transfer office of said company, at No. 65 Broadway, New York City, or at the office of the company in the city of San Francisco at the option of the stockholders, monthly, during the months of August, September, October, November and December, 1879, and January, February, March, April, May, June, July, August and September, 1880, and that each of said dividends was for twenty-five cents per share on each of said 100,000 shares of the capital stock of said Excelsior Company, making in all the sum of \$25,000 for each of said dividends, and amounting in all to the sum of \$350,000 or thereabouts.

11. This defendant denies, upon his information and belief, each and every allegation of the eleventh section or subdivision of the complaint, except that this defendant denies, that at either or any of the times mentioned or referred to in said eleventh section or subdivision, he knew that the said dividends were not, or that any of them was not, earned by said Excelsior Company, or that the said company had not the money wherewith to pay the same, or either of them, or that the same, or either or any thereof, were not made or paid out of, or from the surplus profits arising from the business of said corporation, or in the cases or manner allowed by law; and except that this defendant denies, that the money to pay said dividends, or either or any of them, was obtained by said defendants, or any of them, either alone or in conjunction with any person or persons whomsoever, by any improper, wrongful, fraudulent, or illegal overdraft or overdrafts, in the name of said company or otherwise,

34 upon the Bank of California or elsewhere; and except that this defendant denies, that said money, or any thereof, was wrongfully or fraudulently, or otherwise advanced or obtained, by the or any of the defendants, in aid of any wrongful, fraudulent or other conspiracy; and except that this defendant denies, that these defendants, or any of them, divided, withdrew or paid over to the stockholders of said company, or to any of them, or to any person or persons whomsoever, \$350,000, or any other amount of the capital, or capital stock of said corporation; and except that this defendant admits, that certain sums of money were, from time to time, advanced to said Excelsior Company
 35 by said Lounsbery & Haggin, and by this defendant and that portions of said dividends were paid therewith; and except that this defendant denies each and every allegation of said eleventh section or subdivision, charging or tending to charge, or attempting or purporting to charge this defendant with any fraud or wrong, or fraudulent or illegal, or other combination or conspiracy.

12. This defendant denies each and every allegation of the twelfth section or subdivision of the complaint, except that he has no knowledge or information sufficient to form a belief as to what the books of the said Excelsior Company showed
 36 as to its indebtedness at the time or times referred to in said twelfth section or subdivision of the complaint; and except that this defendant admits that the said company at one time appeared, by its books, to be largely in debt to said Bank of California, and to said defendants Lounsbery & Haggin, and except that he has no knowledge or information sufficient to form a belief as to whether or not said company appeared by its books to be largely or otherwise in debt to this defendant, or to the defendant Wells, Fargo & Co.; but this defendant alleges, on his information and belief, that at the times said indebtedness was incurred

said company had abundant assets with which to pay each and all its debts, as well as sufficient surplus profits with which to pay all the dividends by it declared and paid. 37

13. This defendant alleges, that he has no knowledge or information sufficient to form a belief as to what the indebtedness, if any, of said Excelsior Company, at the dates mentioned in the thirteenth section or subdivision of the complaint, appeared by its books to be, or as to whether or not, by the books of said company, its indebtedness at the several dates set forth in said thirteenth section or subdivision of the complaint appeared to amount to the respective sums therein set forth, or to any thereof, or to about the same, or any thereof. 38

14. This defendant denies each and every allegation of the 14th section or subdivision of the complaint, except that he admits that the indebtedness of said Excelsior Company at or on or about, the or some of the several dates mentioned in the 13th section or subdivision of the complaint was composed in part of over drafts made from time to time by and in the name of said company upon the Bank of California; and except that he has no knowledge or information sufficient to form a belief as to what part or portion of the indebtedness of said company was composed of such overdrafts or as to whether or not such overdrafts on or about January 31, 1880, amounted to about the sum of \$102,208.57 or any other sum; and except that he admits that after January 31, 1880, the defendants Lounsbery & Haggin loaned and advanced to said company at or about the following dates, the following sums of money, to wit: 39

40	On February 3, 1880.....	\$23,088
	On March 4, 1880.....	25,000
	On April 3, 1880.....	25,000
	On May 3, 1880.....	25,000
	On June 3, 1880.....	25,000
	On July 3, 1880.....	25,000
	On August 5, 1880.....	25,000
	On September 6, 1880.....	25,000

and other large sums of money, and also admits that after January 31, 1880, this defendant loaned and advanced said company certain sums of money, and that portions of said sums of money so loaned and advanced by said Lounsbery & Haggin and by
41 this defendant, were used in the payment of some or portions of the dividends in this answer above mentioned, and except that this defendant admits that on or about the dates of the respective loans or advances by the said Lounsbery & Haggin in this subdivision of this answer above set forth, this defendant for and on account of the said Lounsbery & Haggin, took the checks of said company on said Bank of California, for the said sums so loaned amounting in all to about \$198,088, and also admits that at the times of taking said checks this defendant knew that the said Excelsior Company had no money in said bank wherewith to meet or pay said checks; and also admits that said
42 checks so given were held and retained by said defendants Lounsbery & Haggin, or by this defendant acting on their behalf without payment and without presentation for payment until on or about November 11, 1881, and also admits that at said last mentioned date the said checks were cancelled and delivered up to said company, and the promissory note of said company was delivered to said Lounsbery & Haggin, or to this defendant on their behalf, therefor.

15. This defendant denies on his information and belief each and every allegation contained in

that portion of the 15th section or subdivision of 43
the complaint between the beginning thereof and
the word "affairs," on the 10th line of folio 53;
and this defendant denies each and every alle-
gation contained in the remaining portion of said
fifteenth section or subdivision of the complaint
except that he admits that no annual meeting of
the stockholders of said Excelsior Company was
in fact called or held during the year 1880; and
except that he admits that the trustees of said
company who had been elected in the year 1879,
held over and continued in office and power for
another year, and until the stockholders' meeting
held on or about March 15, 1881, save and except
as new trustees were appointed to fill vacancies 44
from time to time occurring; and except that he
has no knowledge or information sufficient to form
a belief as to whether or not in March 1880, said
Excelsior Company appeared by its books to be in
debt in the sum of \$150,000, or upwards or any
other sum.

16. This defendant denies each and every alle-
gation of the 16th section or subdivision of the
complaint, except that he admits that on or about
May 25, 1880, the trustees of said Excelsior Com-
pany duly voted and directed that \$50,000 of the
mortgage bonds of said company due and payable
July 1, 1880, should be redeemed on the last afore- 45
said date; and except that he has no knowledge or
information sufficient to form a belief as to whether
or not at or about that time said company received
from its said mines and property, sufficient returns
to have paid said \$50,000, of bonds so ordered to
be redeemed, or as to what returns said company
received at or about said date; and except that
he admits that the defendants Lounsbury & Hag-
gin, or this defendant on their behalf, on or about
July 1, 1880, loaned and advanced to said company
the sum of \$50,000 for the purpose of taking up said
bonds, and that the said bonds were held and re-

46 tained by this defendant for and on behalf of said Lounsbery & Haggin until the same were returned to the said company and cancelled on or about November 11, 1881 as hereinafter stated or admitted.

17. This defendant denies each and every allegation contained in the 17th section or subdivision of the complaint, except that he alleges on his information and belief that in or about the month of September 1880, said Excelsior Company made and published and circulated among its stockholders, the following statement giving the true reasons for suspending the payment of dividends,
47 to wit:

“ OFFICE OF THE EXCELSIOR WATER AND MINING
“ COMPANY,

“ 202 Sansome Street, San Francisco,

“ September 13, 1884.

“ *To the Board of Trustees of the Excelsior Water and
“ Mining Company:*

“ GENTLEMEN:—Agreeably to your instructions,
“ I have visited Smartsville, and made an examination of the mines, ditches, and other property of
“ the Excelsior Water and Mining Company. The
48 “ only material changes in the condition of the
“ mines, since my visit in May last, have occurred
“ in the Deer Creek and Smartsville claims. In
“ both these claims the bedrock has pitched considerably, carrying with it the rich channel
“ gravel. While this circumstance largely increases the amount of the best gravel, yet the
“ sinking of the bedrock necessitates new cuts for
“ washing.

“ In the Deer Creek claim which, as you are
“ aware, is the most extensive mine owned by the
“ company, the pitch of the bedrock was over
“ fifty feet, and the superintendent found it neces-

“ sary to construct a branch tunnel to bottom 49
 “ the channel which cannot be reached through
 “ the present open cuts.

“ Likewise in the Smartsville claim, the bedrock
 “ pitched some thirty-five feet below the mouth of
 “ the incline leading to the tunnel. Consequently
 “ operations of washing had also to be suspended
 “ here in order to extend the bedrock tunnel
 “ under the deep gravel, and make another inclined
 “ uprise through it to the surface.

“ This claim is the next most extensive, and
 “ much the richest of any owned by the company.

“ These unforeseen contingencies have compelled
 “ the superintendent to run entirely upon the
 “ lower grade gravel, and this fact, taken in con- 50
 “ nection with the unprecedentedly severe winter of
 “ 1879-80, suggests the wisdom of deferring fur-
 “ ther dividends until such time as the tunnel work
 “ is completed.

“ I am convinced from the present improved
 “ appearanc of the mines that with a full supply of
 “ water the future results will be highly satis-
 “ factory.

“ Yours respectfully,

“(Signed) L. C. McAFEE,

“ Secretary.”

18. This defendant denies each and every al- 51
 legation contained in the 18th section or sub-
 division of the complaint, except that he denies
 on his information and belief that the defendants,
 Lounsbury & Haggin, or either of them, or the
 defendant, Wells, Fargo & Co., made the or either
 or any of the statements or representations in the
 said section or subdivision of the complaint al-
 leged to have been made by the defendants, or
 either or any of them.

19. This defendant denies each and every al-
 legation of the 19th section or subdivision of the
 complaint.

52 20. This defendant denies each and every allegation of the 20th section or subdivision of the complaint.

21. This defendant denies each and every allegation of the 21st section or subdivision of the complaint.

22. This defendant denies each and every allegation of the 22d section or subdivision of the complaint, except that he admits that certain of the stockholders of said company executed and delivered to him proxies upon their stock to be used at the meeting of stockholders of said company held on or about March 15, 1881, which proxies were in substantially the following form, to wit:

KNOW ALL MEN BY THESE PRESENTS that I do hereby make, constitute, and appoint J. B. Haggin my true and lawful attorney for me, and in my name, place, and stead, to vote as my proxy at any stockholders' meeting of the Excelsior Water and Mining Company, or adjournment of said meeting according to the number of votes which I should be entitled to if personally present, with full power of substitution and revocation. Witness my hand and seal at—the——day of——1881.

54

—————Seal.

Witness:

and except that he has no knowledge or information sufficient to form a belief as to whether or not any of the proxies so executed and delivered to him were proxies of the plaintiff or of plaintiffs' alleged assignors or any thereof; and except that he denies on his information and belief that the proxies so executed and delivered to him represented a majority of the stock of said Company, or were given by a majority of the stock-

holders thereof; and except that he admits that at said meeting, the resolution substantially in the form alleged in folios 76 and 77 of the complaint, was duly adopted; and except that he admits that at said meeting there were personally present the five persons named in folio 77, of the complaint; and except that he has no knowledge or information sufficient to form a belief as to whether or not said five persons were the only persons who were personally present at said meeting; and except that he admits that the proxies executed and delivered to him authorized and empowered him to substitute some one in his place and stead, and that under and by virtue of the powers given to him by said proxy this defendant had, prior to said meeting, transferred said proxies to the name of said Joseph Clark; and except that he alleges on his information and belief that there were present and voting at said meeting, in person or by proxy, a majority of the stockholders of said company, and stockholders representing and owning a majority of the capital stock thereof.

23. This defendant denies each an every allegation of the 23d section or subdivision of the complaint, except that he admits and on his information and belief alleges that the said Louis C. McAfee, as Secretary of said company, presented to the said stockholders his report for the year 1880; and except that he denies on his information and belief that said report was not in fact presented to said meeting or properly brought to the notice of the stockholders; and except that he has no knowledge or information sufficient to form a belief as to whether or not said report in fact covered the transactions of the said Excelsior Company for a portion of the year 1879; and except that he admits that by said report it was stated and represented that the defendants, Lounsbury & Haggin, had, during the year 1880, loaned to said company, a large sum of money;

58 and except that he has no knowledge or information sufficient to form a belief as to whether or not said report stated or represented that the sum of money so loaned by said defendants, Lounsbery & Haggin, was the sum of about \$257,088; or as to what sum was stated or represented to have been so loaned by said Lounsbery & Haggin; or as to whether or not it was stated or represented in said report that said company had, during the time embraced in said report, or at all, borrowed from the Bank of California, the sum of \$73,520.46, or any other sum; or as to whether or not a copy of said report was, at or about that time or at all,
59 either of them, or to the defendants, Wells, Fargo & Co.; or as to whether or not the said report was received by said Lounsbery & Haggin, and Wells, Fargo & Co., or either or any of them, at their offices in the City of New York or elsewhere; or as to whether or not said Lounsberry & Haggin, or either of them, or said Wells, Fargo & Co., denied to the stockholders of said Excelsior Company, or at all, the existence of said report, or that it had ever been made, or that they or either of them ever had seen it or had a copy of it.

24. This defendant denies each and every allegation of the 24th section or subdivision of the
60 complaint.

25. This defendant denies each and every allegation of the 25th section or subdivision of the complaint, except that he admits and alleges on his information and belief that the Board of Trustees of said Excelsior Company laid and levied an assessment of one dollar per share upon each and every share of the stock of said company on or about the 6th day of June, 1881, and a further assessment of fifty cents per share upon each and every share of the said stock on or about October 7, 1881, and a further assessment of one dollar

per share upon each and every share of said stock on or about January 9, 1882, and that said assessments amounted in all to the sum of \$250,000, and that said company caused and procured notices of said several assessments to be published at and in the City of New York and elsewhere, and printed notices thereof to be sent to the stockholders of record of said company; and except that this defendant has no knowledge or information sufficient to form a belief as to whether or not said printed notices were sent to plaintiff or his alleged assignors, or any thereof; and except that this defendant admits that in and by the several resolutions under which said assessments were laid and levied it was in substance provided that any stock upon which the said several assessments should remain unpaid on a day therein named should be delinquent, and should be advertised for sale at public auction, and that unless payment should be previously made said stock would be sold at the office of the company at San Francisco, on a day therein named, to pay the delinquent assessment, together with the cost of advertising and the expenses of the sale; and also admits that thereunder certain shares of the stock of the said company were sold at or about the amount of the said several assessments, and that certain of said shares so sold were purchased by or on behalf of said Lounsbery & Haggin and this defendant; and except that this defendant has no knowledge or information sufficient to form a belief as to whether or not plaintiff or plaintiff's alleged assignors or any of them paid the amount of said several assessments, or any part thereof, on any stock.

26. This defendant denies each and every allegation of the 26th section or subdivision of the complaint, except that he has no knowledge or information sufficient to form a belief as to whether or not the defendants, Lounsbery & Haggin and Wells, Fargo & Co., or either or any of them madd

64 the, or either or any of the statements or representations in said 26th section or subdivision of the complaint alleged to have been made, or as to what statements or representations, if any, said defendants, Lounsbury & Haggin and Wells, Fargo & Co., or either or any of them made relative to the matters and things in said 26th section or subdivision of the complaint set forth or alleged; and except that he admits that at or about the time of the levying of the said first assessment the indebtedness of the said Excelsior Company exceeded the sum of \$350,000; and except that he has no knowledge or information sufficient to form a belief as to whether or not any of the money received
 65 under said first assessment was used to pay any part of the bonded debt of said Company; or as to whether or not said money so received was applied in whole or in part to the payment of certain or any notes of said Company.

27. This defendant denies each and every allegation of the 27th section or subdivision of the complaint, except that he admits that the Board of Trustees of said Excelsior Company, at a meeting thereof held on or about November 11th, 1881, passed and adopted certain resolutions in substantially the form set forth in folios 91 to 97 inclusive, of the complaint; and except that he
 66 admits that in conformity with the said resolutions the President and Secretary of said company did make and deliver to the defendants, Lounsbury & Haggin, the promissory note of said company for \$286,140.89 and that said promissory note was substantially in the words and figures set forth in folios 95 and 96 of the complaint, and that thereupon the defendants, Lounsbury & Haggin, or this defendant on their behalf, delivered to said company its checks to the amount of \$201,088, and also fifty of the mortgage bonds of said company, which had been redeemed by said Lounsbury & Haggin on or about July

1st, 1880; and that there was included in said note the sum of \$35,052.89 or thereabouts, for interest to said 11th day of November, 1881, at the rate of nine per cent. per annum, compounded monthly on the debt represented by said checks and bonds; also that said Lounsbury & Haggin received said note and retained the same until it was subsequently delivered up to said company and cancelled, as hereinafter set forth or admitted; and except that he admits that of the sundry sums of money stated in the said first clause of said preamble to have been advanced from time to time to said Excelsior Company by said Lounsbury & Haggin, and for which said company gave its checks on the Bank of California, certain parts were the same moneys which were in part used and paid out by said company in the payment of some of the dividends hereinbefore mentioned. 67 68

28. This defendant denies each and every allegation of the 28th section or subdivision of the complaint, except that he admits that on or about February 28th, 1882, the Board of Trustees of said Excelsior Company at a meeting thereof, held on that day, duly passed and adopted certain resolutions substantially in the form set forth in folios 101 to 107 inclusive, of said complaint; and except that he admits that said company did thereafter in conformity with said resolutions, make the promissory notes in substantially the form set forth in said resolutions, and did deliver the same to said Lounsbury & Haggin; and except that he admits that said company did pay to the said Lounsbury & Haggin, or to this defendant, on said note last mentioned in said resolution, certain sums of money amounting in the aggregate, to wit, about \$, 69

29. This defendant denies each and every allegation of the 29th section or subdivision of the complaint.

70 30. This defendant denies that he ever conspired with any person or persons for any purpose, and especially denies that he conspired with any or all of the persons described in the complaint for any purpose, and especially denies that he conspired with any or all of the persons named in the complaint, or with any other person or persons, for any of the purposes alleged in the complaint.

31. This defendant denies each and every allegation of the complaint tending to charge or charging, or attempting or purporting to charge this defendant with any fraud, and especially denies that any act or statement of his concerning said
71 company or its property or its capital stock, was false or fraudulent, or done or made with fraudulent intent.

32. This defendant denies each and every allegation of that portion of the complaint contained on pages 38 and 39 thereof, except that he has no knowledge or information sufficient to form a belief as to whether or not at various times between the 1st day of July, 1879, and the 31st day of December 1880, or at any time Thomas B. Bowring, mentioned in the complaint, purchased 675 shares of stock of said Excelsior Company, or any other number of shares of said stock; or
72 as to whether or not, said Bowring paid for any of said stock various or any sums of money amounting in all to the sum of \$12,000 or any other sum; or as to whether or not said Bowring paid, as assessments or otherwise upon any stock purchased by him further sums to the amount of \$1,687.50, or any other amount; or as to whether or not the amount by him paid out in the purchase of any of the stock of said Excelsior Company, and in the payment of assessments thereon was in all the sum of \$13,687.50, or any other sum; or as to whether or not before the commencement of this action, said Bowring by an in-

strument in writing or otherwise, or duly or otherwise, sold, assigned, transferred or set, or delivered over to the plaintiff herein, or to any other person, all or any claims or causes of action against the said defendants or any of them; or as to whether or not the plaintiff is now the owner or holder of any such claims or causes of action. 73

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And for a further, separate and distinct defense to the alleged cause of action in said complaint contained, this defendant reasserts and realleges all that he has hereinbefore alleged in subdivisions 1 to 31 inclusive, of this answer and further alleges:

32. This defendant denies each and every allegation contained in the alleged cause of action of said complaint, except that he has no knowledge or information sufficient to form a belief as to whether or not at any time or times whatever the said
- 77 purchased or any shares of the stock of said Excelsior Company; or as to whether or not said paid for said or any of said stock the sum of \$, or any other sum; or as to whether or not said paid as assessments or otherwise upon any stock purchased by him further sums to the amount of \$, or any amount; or as to whether or not the amount by said paid out in the purchase of any of the stock of said Excelsior Company, and in the payment of assessments thereon, was in all the sum of \$, or any other sum; or as to whether or not, before the commencement of this action, said by an instrument in writing,
- 78 otherwise, duly, or otherwise, sold, assigned, transferred, or set, or delivered over to the plaintiff herein, or to any other person, all or any claims or causes of action against the said defendants, or any of them, or as to whether or not the plaintiff is now the owner or holder of any such claims or causes of action; and except that he has no knowledge or information sufficient to form a belief as to whether or not said purchased any of said stock from these defendants, or either or any of them.

And for a further, separate and distinct defense to the alleged cause of action in said complaint contained, this defendant reasserts and realleges all that he has hereinbefore alleged in subdivisions 1 to 31 inclusive, of this answer and further alleges:

32. This defendant denies each and every allegation contained in the alleged cause of action of said complaint, except that he has no knowledge or information sufficient to form a belief as to whether or not at any time or times whatever the said purchased or any shares of the stock of 80 said Excelsior Company; or as to whether or not said paid for said or any of said stock the sum of \$, or any other sum; or as to whether or not said paid as assessments or otherwise upon any stock purchased by him further sums to the amount of \$, or any amount; or as to whether or not the amount by said paid out in the purchase of any of the stock of said Excelsior Company, and in the payment of assessments thereon, was in all the sum of \$, or any other sum; or as to whether or not, before the commencement of this action, said by an instrument in writing, or otherwise, duly, or otherwise, sold, assigned, transferred, or set, or delivered over to the plaintiff 81 herein, or to any other person, all or any claims or causes of action against the said defendants, or any of them, or as to whether or not the plaintiff is now the owner or holder of any such claims or causes of action; and except that he has no knowledge or information sufficient to form a belief as to whether or not said purchased any of said stock from these defendants, or either or any of them.

And for a further, separate, and distinct defense, to each of the said

causes
of action in said complaint alleged, this defendant reasserts and realleges all that he has hereinbefore alleged, and further alleges upon his information and belief, that on or about the 22d day of April, 1878, and before any of the defendants herein had any interest whatever in said Excelsior Water and Mining Company, or any connection therewith, Professor Thomas Price, who was and is an experienced and reputable and disinterested mining
83 engineer, examined the affairs and the properties and mines of said Excelsior Water and Mining Company, and made a report thereon to Louis A. Garnett then interested in said company and properties, which report was soon thereafter printed, and which contained a history of the past record of said company and an estimate of its future prospects, which report was concurred in by William Ashburner, an experienced and reputable mining engineer who had long been familiar with the said properties, and intimately acquainted with the workings thereof, and which report stated that the estimated amount of gold yet to be expected from the ground owned by said company would
84 aggregate \$18,400,000. And this defendant alleges upon his information and belief, that said printed report was thereupon given general circulation by the said Garnett, in said City of New York, Boston, and elsewhere; but he alleges that neither such printing nor such circulation of said report by the said Garnett was by, or through, or with the co-operation or knowledge of these defendants or any of them. And this defendant further alleges on his information and belief, that thereafter, but before any of the defendants herein were in anywise interested in said Excelsior Water and Mining Company, and before they or any of them

had any knowledge or information concerning its property or affairs, one J. C. Birdseye caused another and further examination of the properties of said Excelsior Company to be made by one Raphael Pumpelly, who, as this defendant is informed and believes, was and is an experienced and reputable and disinterested mining engineer. That thereafter and on or about the 11th day of November, 1878, the said Raphael Pumpelly, in pursuance of such employment, made his report in writing to the said J. C. Birdseye, which was subsequently printed, and generally and publicly circulated by the said Birdseye; but this defendant alleges that neither such printing nor such circulation of said report by the said Birdseye was by, or through, or with the co-operation or knowledge of these defendants or any of them; and he alleges on his information and belief that said Birdseye so printed and circulated said report for the purpose of inducing the purchase of the stock of the said Excelsior Water and Mining Company by various persons; and this defendant alleges that after the printing and circulation of the said report of the said Pumpelly, the attention of this defendant was first called to the said company and its properties, and that from the said reports of Price, Ashburner and Pumpelly, this defendant derived his first knowledge of the properties of the said Excelsior Company.

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This defendant alleges, on his information and belief, that among other things stated by the said Pumpelly in his said report, he stated that he estimated the amount of gold yet to be obtained from the properties of the said company at that date to be \$24,500,000, and stated that he estimated the gross annual product of the properties of the company from its bullion returns at an average of \$800,000, and also stated that independently of its mining property, the company derived a revenue of about \$75,000 per annum, and that he estimated the net annual income of the said company to be \$638,800, and also stated that there was little

88 doubt of the ability of said company to secure a net income of \$600,000 yearly, and further stated that after the exhaustion of the company's gravel, the water in its control could readily be sold for mining or irrigation, or both, at not less than ten cents an inch, which would give a net annual return of about \$180,000 for many years, and that even after mining should cease, the water would bring a revenue of over \$100,000 yearly for irrigating purposes, and further stated that he had only heard favorable opinions among hydraulic miners concerning said property.

This defendant further alleges, on his information and belief, that subsequently to the making
89 and distribution of said report of Raphael Pumpelly, a statement was prepared by and under the direction of the said J. C. Birdseye, but, as he alleges, not by or through, or with the co-operation or knowledge of these defendants, or any of them. This defendant alleges, on his information and belief that said statement was addressed "TO INVESTORS," and was printed, and referred to the examination of the property made by Rossiter W. Raymond and his report thereon, and to the said reports of said Price, Ashburner and Pumpelly; that said statement designates itself as having been "made at the expense and in the interest of parties desiring to invest," and stated that it was proposed to
90 increase the capital stock of said Excelsior Company from 50,000 to 100,000 shares of \$100 each, and to list said stock on the New York and San Francisco Stock Exchanges, with the transfer office, and dividends payable in the former city: and said statement also contained, among other things, the following statements, viz:

" From considerations of a purely personal nature, a limited number of shares of this stock is offered for subscription at forty dollars per share, which, it will be perceived, is considerably below the estimated value of the engineers, but the important ends to be secured by a prompt sale

“ justify the temporary sacrifice. An investment 91
 “ at such a price with the prospective stock divi-
 “ dend, and future advance in value of the stock
 “ under the large cash dividends, it is confidently
 “ believed, will prove one of the most remunera-
 “ tive ever offered to the public.”

This defendant further alleges on his information and belief, that the said statement, after having been printed, was generally and publicly circulated, or caused to be circulated by the said Birdseye, but he alleges that neither such printing nor such circulation was by or through or with the co-operation or knowledge of these defendants or any of them; and he alleges on his information and belief that said Birdseye so circulated or 92
 caused to be circulated the said statement for the purpose of inducing this defendant, among others, to purchase the stock of the said Excelsior Company.

And this defendant alleges on his information and belief that plaintiff and his alleged assignors saw and read said reports and statements prior to the time of their alleged purchases of said Excelsior stock, and that if they made said purchases, they were induced to make them by the statements and representations made by said reports and statement, and by the said Birdseye, and not by any acts, statements or representations of these defendants or any of them. 93

That this defendant alleges on his information and belief that contemporaneously with the preparation and distribution of said statement, and subsequently thereto, the said Birdseye himself, and through his agents and by means, among other things, of the reports and statements hereinbefore in this defense designated, endeavored to negotiate a sale of the properties or stock of the said Excelsior Company to various persons, and that it was only during the progress, and by means of the efforts of the said Birdseye so to negotiate the sale of the properties or stock of the said company,

94 that said company and its stock and properties were first brought to the attention of this defendant.

This defendant further alleges that thereafter, and subsequent to the preparation and circulation of the various reports, and the statement hereinbefore referred to, and on or about the 25th day of April, 1879, this defendant was invited by others, not parties to this action, to purchase certain shares of said Excelsior stock.

95 That thereupon, and before making or agreeing to make said purchase, this defendant employed Louis Janin, a distinguished, disinterested, reputable and competent mining engineer and expert, to make an independent examination of, and report upon the properties, condition and affairs of the said Excelsior Company.

That thereupon the said Janin examined the said properties, condition and affairs of said company, and on or about the 16th day of May, 1879, made his report thereon in writing, to which report this defendant begs leave to refer, and of which a copy is hereto attached, marked Exhibit A, and made a part of this answer.

96 That in the said report the said Janin estimated the value of the gravel on the said properties of the said companies at \$18,700,000, and the total product of bullion per annum at \$646,580, and the yearly net profit of working the properties of the company at \$446,580, and in view of all the contingencies he estimated the annual net profits of the company to be \$400,000, and the net revenue of the company from other sources than mining and after mining should have ceased, at \$100,000 per annum, and estimated that the business of the said company could be conducted at the profit above set forth for a period of 25 years and perhaps longer, after which there would be still left to the company all of its property except the gold producing portion of the property before set forth.

That this defendant further alleges that the

said reports of the said Price, Ashburner, Pumpelly and Janin agreed in all substantial particulars in their estimate of the value and income producing capacity of the said properties of said Excelsior Company, and agreed in estimating the total value of the said properties to be upwards of \$18,000,000, and the average net earning capacity of the same to be upwards of \$400,000 yearly. 97

That a copy of said report of said Pumpelly is hereto attached, marked "Exhibit B," and made a part of this answer.

And this defendant alleges that thereupon after the receipt of the report of the said Janin, and relying upon the statements of the said report of said Janin, as well as of the said reports of the said Price, Ashburner and Pumpelly, and upon the said statement, addressed "TO INVESTORS," and believing, and having good reason to believe in the capacity and the integrity of the said experts, Janin, Price, Ashburner, and Pumpelly, and without any further or other knowledge or information of the condition, affairs or property of said company, this defendant purchased from time to time sundry lots of shares of the increased capital stock (of \$10,000,-000) of the said Excelsior Company. 98

That before the purchase of said stock, or any thereof, by this defendant, or any of the defendants herein, the capital stock of the said company had been already increased from 50,000 to 100,000 shares of \$100 each, and that with such increase neither this defendant nor either of the other defendants herein had anything whatever to do. 99

That of the stock so purchased by this defendant, a portion was sold by or through said defendants composing the firm of Lounsbery & Haggin to various persons, whose names are unknown to this defendant, and a large portion, amounting to several thousand shares, was owned and retained by this defendant, and by the defendants Lounsbery & Haggin, until after the month of March, 1882, prior to which time all the assessments al-

100 leged in the complaint had been levied and collected.

That this defendant furnished to the defendants Lounsbery & Haggin the reports and the statement herein before designated; and that this defendant, at the time of furnishing said reports and statement to said Lounsbery & Haggin, believed said reports and statement to be true, and believed the property to be a good one, and worth far more than the rate at which this defendant, or said Lounsbery & Haggin, sold any of the stock of the said Excelsior Company.

101 That the investigation made by this defendant of the value of said property and the affairs of said company, prior to said purchase of its said stock, was as thorough, impartial, and competent an investigation as could be made.

102 That no inducements were held out, or representations made by this defendant, or, as this defendant alleges on his information and belief, by either or any of the other defendants herein, for the purpose of inducing any person or persons to buy said stock. But that on the contrary thereof, as this defendant alleges on his information and belief numerous applications were voluntarily made to said defendants, Lounsbery & Haggin, by proposing purchasers of said stock, for the same, and that numerous requests were made by said proposing purchasers to the said Lounsbery & Haggin to sell said stock to said proposing purchasers without any representations whatever concerning the said property or said company or said stock having been made by this defendant or by said Lounsbery & Haggin; and this defendant alleges on his information and belief that no representations whatever were made by the said Lounsbery & Haggin, or either of them, concerning the said stock or said properties, except in answer to inquiries of said proposing purchasers, and that the only representations or statements then made by said Lounsbery & Haggin, or either of them, were, that they (said

Lounsbery & Haggin) believed said report of Louis Janin to be true, and believed said property to be a good one, capable of paying dividends. 103

That in addition to the facts hereinabove alleged which induced this defendant to believe that the said reports and statement were true and correct, and that the estimates therein contained were reasonable and just, was the fact as this defendant was and is informed and believes, that the Superintendent of the properties of the said company, and William Ashburner, the President of said company, who were on the ground and personally familiar with the said properties and their developments and the business and operations of the said company, and who alone were in a position to judge or who were capable of judging of the actual production of the said mines at the times mentioned in the said complaint, held and owned very large amounts of the capital stock of the said company, all of which during the times mentioned in the complaint they could have sold at a price as high as \$29 per share, and for a large proportion of which that price was offered said Superintendent and said President, but that the said Superintendent and said President sold none of said stock, and this defendant alleges on his information and belief that they still hold and have not sold any part of the said stock so held by them at the times mentioned in the complaint; and further alleges on his information and belief that during all said times said President and Superintendent each held a large number of said mortgage bonds of said company. 104

And this defendant alleges on his information and belief that during the fall and winter of 1879, extensive additions had been made, and were in process of being made, to the working and producing capacity of the property of the said company, such as extensive flumes, tunnels, and other apparatus. 105

And this defendant alleges on his information

- 106 and belief, that according to the usage and practice of hydraulic miners in the district within which the mines of said Excelsior Company are situated, and elsewhere, and as a measure of economy in the operation of mines by the hydraulic process, long intervals of time are permitted to elapse between the regular periods of cleaning up the flumes, sluices, and tunnels in which the gold is deposited from the gravel and earth washed; and this defendant alleges, on his information and belief, that the said Excelsior Company, acting under the advice of competent and experienced experts, and in accordance with said usage and practice of hydraulic miners, and as a measure of
- 107 economy, permitted long intervals of time to elapse between the regular periods of cleaning up its flumes, sluices and tunnels, and collecting and removing the gold deposited therein; and that by reason thereof no final clean up of the flumes, sluices and tunnels of said company was made by said company from the month of July, 1879, until the month of September, 1880; that said Excelsior Company was advised by said experts that the amount of gold accumulated in said tunnels, sluices and flumes could be calculated with substantial accuracy from month to month, according to the amount of water used, and the quantity of gravel or earth washed, without making such clean ups.
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That the said company thereupon caused careful estimates to be made by said experts of the amount of gold accumulated, and to accumulate from month to month in said tunnels, and thereafter for several months declared dividends, the amount of which was based upon said expert calculations and computations of the amount of gold which had so accumulated in said flumes and tunnels, and of the net or surplus profit thereby accruing to said company.

And this defendant alleges, on his information and belief, that said calculations and computations

were conservative, and that the general experience of hydraulic mining companies in the State of California justified the said company in adopting the calculations and computations as calculations and computations of actual assets of the said company on hand. 109

That the said calculations and computations were to the effect that a sufficient amount of gold had accumulated in said unopened and uncleaned flumes or tunnels, between the said month of July, 1879, and the said month of September, 1880, so as to make the net or surplus profit of the said company during said period the sum of \$400,000 and upwards. That during the said period the said company paid out to its said stockholders, in dividends, the sum of \$350,000, and that said dividends were so paid in accordance with the general usage and practice of hydraulic mining companies in the State of California. 110

That the fact that the result of the clean-ups of said flumes and tunnels about the month of September, 1880, was not as much as it had been calculated to be by the company's experts, and not any change in the actual or estimated values of the properties of the said company, led to the cessation of the payment of dividends on the company's stock.

That when the main flume or tunnel of said company was cleaned up, in or about the month of September, 1880, it was found that the accumulations of gold therein had not been nearly as large as they had been computed to be by the said experts, and that the reason for the error in said computation, which this defendant further alleges on his information and belief could not have been foreseen, was the fact that the bed-rock underlying said main flume had so pitched or shifted as to cause the rich gold-bearing gravel to fall below the level of the tunnel through which it was being worked. 111

That about the month of September, 1880, said

112 Lounsbery & Haggin reported to such stockholders as they knew or could reach, the fact that the said company proposed to cease paying dividends, and so reported, as soon as that fact was known to this defendant or to said Lounsbery & Haggin.

That at and during each and all of the times at which all of the dividends hereinbefore mentioned were declared and paid, this defendant and the other trustees of said company were informed by the superintendent of said company, and by experts and others who had the means of knowing the facts, that the said mines and properties had produced, and were producing large surplus profits; and had accumulated, and were accumulating a
 113 surplus more than sufficient for the payment of said dividends. That this defendant and said trustees had good reason to, and did rely on, and believe said information, and that this defendant is informed, and now believes that said information was true and correct, and that each and all of said dividends, and every part thereof were paid out of the surplus profits of said company, accumulated and earned from time to time, and that no part of the capital, or capital stock, was ever withdrawn, divided, distributed or paid out in dividends.

This defendant alleges on his information and belief, that in May, 1881, an injunction was granted
 114 in proceedings brought in the courts of the State of California and served on said company, which said injunction had the practical effect of restraining the said company from working its mines.

That the fact of the pendency of the said injunction suit and the granting of said injunction was widely and publicly known through reports in public newspapers, and this defendant alleges on his information and belief that the defendants, composing the firm of Lounsbery & Haggin, reported the fact of said injunction suit and the granting of said injunction to such of the stockholders of said company, as they knew or could

reach, as soon as this defendant, or said Lounsbery 115
& Haggin knew said facts.

That immediately after the annual meeting of
said company, on the 16th of March, 1881, and as
soon as the effect upon the affairs of the said com-
pany of the facts hereinabove set forth, could be
definitely ascertained, said company made up its
balance sheet as of the date of March 16, 1881,
which said balance sheet is in the words and
figures following, to wit:

EXCELSIOR WATER AND MINING COMPANY.

BALANCE SHEET, MARCH 16th, 1881.

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Dr.

Water Rights & Ditches....	\$1,022,841	18	
Mining Claims and Plants..	1,488,271	76	
Enterprise Mining Co.....	25,068	13	
Enterprise Mining Co. Stock	113,966	13	
Pacific Powder Co.....	12,000	00	
Union Ranch.....	7,200	00	
Nevada County Lands.....	3,000	00	
Hydraulic Miners' Ass'n....	6,340	00	
Branch Tunnel.....	52,607	34	
Real Estate.....	17,273	41	
Smartsville Water Works...	5,033	87	
Excelsior Farm.....	50,494	06	
Excelsior Farm Business...	7,051	70	
Machinery Account	16,643	75	
Pipe Shop.....	208	61	117
Ditch Account.....	3,946	92	
Big Ravine Claim..	462	05	
Excelsior Claim	3,201	43	
Smartsville Claim.....	662	05	
Deer Creek Claim.....	14,020	94	
Bills Receivable....	68,701	69	
Excelsior Store.....	39,516	51	
Interest Account.....	1,678	97	
Patent Expense.....	1,411	10	
Contingent Expense.....	1,624	02	
General Expense.....	1,779	11	
Purchasing Agent.....	54	33	
Coupon Account.....	3,750	00	
	<hr/>		
			\$2,968,809 06

118 Cr.

Capital Stock..	\$2,383,398 62
Vulcan Powder Co. Stock..	5,027 50
First Mortgage Bonds, in- cluding \$50,000 called in but not paid.....	200,000 00
Excelsior House.....	56 30
Bills Payable.....	50,000 00
Water Sales.....	39,521 01
San Francisco Bills,(Powder)	12,587 50
Discount Account.....	627 86
Treasurer, Over- draft at Bank.. \$70,502 27	
Advanced by Lounsbery & Haggin	207,088 00

119

277,590 27

 \$2,968,809 06

And this defendant alleges on his information and belief that many hundred copies of said balance sheet were printed, and that the defendants Lounsbery & Haggin thereupon forthwith furnished a copy of said balance sheet to every stockholder of the said company whom they knew or could reach.

120 That no assessments were made or levied upon the stock of the said company until after the printing and distribution of the said balance sheet, and that every stockholder upon whose stock such assessments were levied, knew, or had the means of knowing, the exact condition of said company, so far as its condition was known to itself at the time when said assessments were levied and paid.

And this defendant alleges that so long as this defendant was officially or otherwise connected with said company, its affairs were in all respects lawfully, honestly, openly and efficiently managed in the interests of said corporation, its stockholders and creditors.

And this defendant alleges on his information and belief that within the last year past, one J. H. Bolles, now the president of the said company, has made a report to the stockholders thereof, to

the effect that notwithstanding the said injunction, 121
 the properties of said company, as water properties
 only, are worth as much money as a majority of
 the said stockholders had paid for said stock in
 said company, which estimate is a larger estimate
 of the values of said properties as water properties
 than that put upon them by the report and state-
 ments before set forth. That said Bolles was
 elected to his said office by the plaintiff, and his
 alleged assignors among others, and that this de-
 fendant is informed and believes that said Bolles
 and Kelsey, hereinafter mentioned, now hold and
 control as trustees 60,000 shares, constituting a
 majority of the capital stock of the said Excelsior
 Company, and that a portion of the said 60,000 122
 shares of stock is the stock alleged in the complaint
 to be owned by the plaintiff and his alleged as-
 signors, and that the statements of said report
 were made by and with the knowledge, assent and
 approval of plaintiff and his alleged assignors.

That the injunction suit above referred to, was
 not finally decided against said company until at
 or about the time of the commencement of the
 above entitled suit, and that almost immediately
 after the final decision of said injunction suit, the
 above entitled suit was brought.

This defendant further alleges on his information
 and belief, that during the autumn of 1883,
 one Frederick W. Kelsey called upon the defend- 123
 ant, Richard P. Lounsbery, and informed the said
 Lounsbery that he had purchased some of the said
 stock from said Louis A. Garnett, these defendants
 and from other parties, strangers to this suit, and
 that he demanded that the said Lounsbery & Hag-
 gin and this defendant, should repay the said
 Kelsey the cost to him of all his said stock, upon
 the ground that they, the said Lounsbery & Haggin
 and this defendant, had procured its sale by
 fraud, and that upon the refusal of the said Loun-
 sbery to pay the said sum or any sum to the said
 Kelsey in response to said demand, the said Kelsey

- 124 stated to the said Lounsbury and threatened that unless the said amount of money was promptly paid to him, he, the said Kelsey, would instigate and induce a large number of the stockholders of the said company to bring suits such as the above entitled suit, and that he was able to and would bring a great number of said suits, and that said Kelsey then stated and threatened that it would be better for said Lounsbury to make said so-called settlement with said Kelsey privately, as he said Kelsey had in his possession and under his control all the evidence of the said alleged frauds of these defendants, and intimated and offered that said evidence would be suppressed if said so-called settlement was made, but that otherwise he would
- 125 heap up suits against these defendants of an harassing and annoying character, until they would be sorry that they had not paid him said sum. And this defendant further alleges on his information and belief that said Kelsey well knew at the time of making said threats that none of these defendants had committed any fraud whatever in the premises, and that none of them owed him any money, and that said threats were made by said Kelsey for the purpose of extorting money from these defendants, and that said threats were made by and with the assent of the plaintiff herein and his alleged assignors as a part of the wrongful and
- 126 fraudulent conspiracy hereinafter set forth.

And this defendant alleges, on his information and belief, that the said Kelsey and the plaintiff herein, and the alleged assignors of the plaintiff and others, have entered into a wrongful and fraudulent conspiracy for the purpose of attempting to extort money from these defendants, and to cheat and defraud these defendants out of property by making said threats, and by the falsely instituting and maintaining of threatening suits, and by inciting, instigating and bringing groundless judicial proceedings, similar to the suit above entitled, and that the above entitled suit is brought as a part

of the said conspiracy, and is falsely instituted and maintained, solely for the purpose of harassing and annoying and extorting money from these defendants, and of attempting to cheat and defraud these defendants out of property; and that said Kelsey and others have brought or caused to be brought another suit in this court against these defendants, the allegations in the complaint in said suit being identical with the allegations in the complaint herein, except as to the names of the plaintiff and his alleged assignors, and the number of shares of stock alleged to have been purchased by them. 127

And this defendant alleges, on his information and belief, that said last named suit is likewise brought as a part of said conspiracy, and is likewise falsely instituted and maintained, solely for the purpose of harassing and annoying and extorting money from these defendants, and of attempting to cheat and defraud these defendants out of property. 128

Wherefore this defendant prays to be dismissed hence with costs.

ALEXANDER & GREEN,

Attorneys for Defendant,

James B. Haggin.

130 STATE OF CALIFORNIA, }
 City and County of San Francisco, } ss.

James B. Haggin being duly sworn, says; that he is one of the defendants named in the above entitled suit; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

131

Subscribed and sworn to before me this
 day of May, A. D. 1884.

[SEAL.]

Notary Public
 in and for the City and County of San Francisco,
 State of California.

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