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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

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12 CLAYTON HARMSTON, an individual;
13 GIGI GEORGE, an individual; JAMES
LEWIS, an individual; MIKE EVANSON,
14 an individual; ERIK SOLARES, an
individual; DAVE PARRY, an individual;
15 ANDREW COHEN, an individual;
NOAH MALLINGER, an individual;
16 CARLOS MUSTAFICH, an individual;
LUIS DEJESUS, an individual; JAMES
17 D. AHERNE, an individual; JASON
KIRCHNER, an individual; REGINALD
18 SCOTT, an individual; GERALD P.
LYONS, an individual; WENDY
19 HURLEY, an individual; HOLLY
STOUMEN, an individual; CHRISTINE
20 ARNDT, an individual; SHAREEF
NASIR, an individual,

21 Plaintiffs,

22 vs.

23 CITY AND COUNTY OF SAN
24 FRANCISCO, HEATHER FONG, an
individual, and DOES 1-50,

25 Defendants.
26
27
28

Case No.

**NOTICE OF REMOVAL OF
ACTION PURSUANT TO 28 U.S.C.
SECTIONS 1441 and 1446;
STATEMENT OF JURISDICTION**

(Federal Question Jurisdiction)

1 TO THE CLERK OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT
 2 OF CALIFORNIA AND TO PLAINTIFFS CLAYTON HARMSTON; GIGI GEORGE;
 3 JAMES LEWIS; MIKE EVANSON; ERIK SOLARES; DAVE PARRY; ANDREW COHEN;
 4 NOAH MALLINGER; CARLOS MUSTAFICH; LUIS DEJESUS; JAMES D. AHERNE;
 5 JASON KIRCHNER; REGINALD SCOTT; GERALD P. LYONS; WENDY HURLEY;
 6 HOLLY STOUMEN; CHRISTINE ARNDT; SHAREEF NASIR, AND THEIR
 7 ATTORNEYS OF RECORD:

8 NOTICE IS HEREBY GIVEN that the City and County of San Francisco and Heather Fong,
 9 Defendants in the above-captioned action, San Francisco Superior Court Case No. CGC-06-454955
 10 hereby file in the United States District Court for the Northern District of California, a Notice of
 11 Removal of said action to said United States District Court, pursuant to 28 U.S. C. §1441, and are
 12 filing in said Superior Court a Notice of Removal.

13 STATE COURT ACTION

14 On or about August 10, 2006, Plaintiffs Clayton Harmston; Gigi George; James Lewis;
 15 Mike Evanson; Erik Solares; Dave Parry; Andrew Cohen; Noah Mallinger; Carlos Mustafich; Luis
 16 Dejesus; James D. Aherne; Jason Kirchner; Reginald Scott; Gerald P. Lyons; Wendy Hurley; Holly
 17 Stoumen; Christine Arndt; Shareef Nasir ("Plaintiffs") commenced a civil action in the Superior
 18 Court of California, in and for the City and County of San Francisco, Action No. Case No.
 19 CGC-06-454955. A copy of the summons and complaint filed in San Francisco Superior Court was
 20 served upon and received by Defendants on or about August 17, 2006, and is attached hereto as
 21 Exhibit A. The complaint alleged claims for (1) racial discrimination under the California Fair
 22 Employment and Housing Act, Cal. Govt. Code §§ 12960, *et al.* ("FEHA"); (2) retaliation under the
 23 FEHA; (3) defamation; and (4) intentional infliction of emotional distress. Defendants filed their
 24 answer in the Superior Court on or about September 18, 2006, and a true and correct copy of the
 25 answer is attached hereto as Exhibit B.

26 On or about October 11, 2006, Defendants filed with the Court, and served Plaintiffs with, a
 27 motion for a protective order precluding certain written and oral discovery by Plaintiffs. A true and
 28 correct copy of Defendants' motion is attached hereto as Exhibit C. On or about that same day,

1 Plaintiffs also filed a motion to compel attendance at deposition of Defendant Heather Fong and a
2 person most knowledgeable. A true and correct copy of Plaintiffs' motion is attached hereto as
3 **Exhibit D**. On or about January 16, 2007, the Court issued an order granting in part Defendants'
4 motion for protective order, and denying in part Plaintiffs' motion to compel. A true and correct
5 copy of the Court's January 16 order is attached hereto as **Exhibit E**.

6 As evidenced on the original complaint, an initial case management conference was
7 scheduled for January 12, 2007. However, on or about January 3, 2007, the Court issued an order
8 continuing the initial case management conference to February 23, 2007. A true and correct copy
9 of the Court's January 3 order continuing the initial case management conference is attached hereto
10 as **Exhibit F**.

11 On or about December 19, 2006, Plaintiffs moved for an order from the Superior Court
12 granting them leave to file a first amended complaint. A true and correct copy of the Plaintiffs'
13 motion is attached hereto as **Exhibit G**. Defendants did not oppose the motion. Therefore, on or
14 about January 22, 2007, the Superior Court issued an order granting Plaintiffs leave to file a first
15 amended complaint. A true and correct copy of the Court's January 22 order is attached hereto as
16 **Exhibit H**.

17 Plaintiffs filed a first amended complaint on or about February 1, 2007. A copy of the first
18 amended complaint was served upon and received by Defendants about the same day, and is
19 attached hereto as **Exhibit I**. The First Amended Complaint alleges claims for
20 (1) racial discrimination under the FEHA; (2) racial discrimination under Title VII of the Civil
21 Rights Act of 1964, 42 U.S.C. §§ 2000e-2, *et seq.* ("Title VII"); (3) retaliation under the FEHA;
22 (4) retaliation under Title VII (5) defamation; and (6) intentional infliction of emotional distress.
23 Defendants filed their answer to the first amended complaint in the Superior Court on or about
24 February 27, 2007. A true and correct copy of Defendants' answer to the first amended complaint is
25 attached hereto as **Exhibit J**.

26 Defendants filed a case management statement with the Superior Court on or about
27 January 29, 2007. A true and correct copy of Defendants' case management conference statement is
28 attached hereto as **Exhibit K**. Plaintiffs filed a case management conference statement on or about

1 February 13, 2007. A copy of Plaintiffs' case management conference statement is attached hereto
2 as Exhibit L. On or about February 14, 2007, the Court issued an order continuing the February
3 23, 2007 case management conference to April 6, 2007. A true and correct copy of the Court's
4 February 14 order is attached hereto as Exhibit M.

5 In addition to the above, Defendants respectfully request that the Court take notice that the
6 parties are currently awaiting a signed order from the Court related to Plaintiffs' *Pitchess* motion for
7 production of non-plaintiff peace officer personnel records. Plaintiffs had filed a *Pitchess* motion
8 on or about January 4, 2007. A copy of Plaintiffs' motion is attached hereto as Exhibit N.
9 Defendants did not oppose the *Pitchess* motion, but requested that the Superior Court issue a
10 protective order protecting subsequent disclosure of these non-plaintiff peace officer personnel
11 records. At a hearing held on February 2, 2007, the Superior Court granted Plaintiffs' *Pitchess*
12 motion, and ordered that all documents produced by Defendants pursuant to the *Pitchess* motion be
13 produced pursuant to a protective order. The parties disagree, however, with respect to the
14 proposed order submitted by Plaintiffs to the Court and the protective order proposed by
15 Defendants.

16 The above represents the only pleadings, processes, and orders on file with the Superior
17 Court to the knowledge of the undersigned, as required by 28 U.S.C. § 1446(a). The above also
18 represents a true and accurate description of the status of the Superior Court action.

19 JURISDICTION

20 Where a defendant is sued in a state court for alleged federal civil rights violations, the
21 defendant has the option of defending in the state court or removing the proceeding to federal court
22 pursuant to 28 U.S.C. §1441(b). Section 1441(b) provides in relevant part:

23 [a]ny civil action of which the district courts have original jurisdiction
24 founded on a claim or right arising under the Constitution, treaties or laws of
25 the United States shall be removable without regard to the citizenship or
26 residence of the parties.

27 Section 1441(a) states that the proper venue upon removal is to the district court "for the
28 district and division embracing the place where such state action is pending." 28 U.S.C. §1441(a).
Section 1446(b) provides that the notice of removal "may be filed within thirty days after receipt by

1 defendant. . . of a copy of an amended pleading, motion . . . or other paper from which it may first
2 be ascertained that the case is one which is or has become removable. . .” 28 U.S.C. § 1446(b).

3 The above-described First Amended Complaint presents a civil action of which this court
4 has original jurisdiction under 28 U.S.C. §1331, in that Plaintiffs allege two causes of action for
5 employment discrimination and retaliation in violation of the laws of the United States, over which
6 this Court has original jurisdiction. The second and fourth causes of action allege violation of
7 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, *et seq.* – a federal statute.

8 Defendants file this Notice within 30 days after Plaintiffs' filing, and Defendants' receipt, of service
9 of the First Amended Complaint, which is the first pleading from which it can be ascertained that
10 this action is removable, pursuant to 28 U.S.C. §§ 1441(a) and 1446(b). To the extent that
11 Plaintiffs' first amended complaint alleges a claim or cause of action other than violations of rights
12 under the laws of the United States, said cause(s) of action may be removed and adjudicated by this
13 Court pursuant to 28 U.S.C. §1441(c). Section 1441(c) provides that:

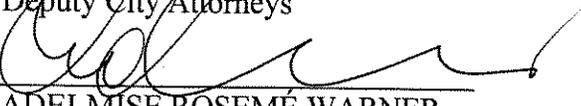
14 Whenever a separate and independent claim or cause of action within the
15 jurisdiction conferred by section 1331 of this title is joined with one or
16 more otherwise non-removable claims or causes of action, the entire case
may be removed and the district court may determine all issues therein, or,
in its discretion, may remand all matters in which State law predominates.

17 WHEREFORE, Defendants pray that the above action now pending in the Superior Court of
18 the State of California in and for the City and County of San Francisco be removed in its entirety to
19 this Court for all further proceedings, pursuant to 28 U.S.C. § 1441, *et seq.*

20 Dated: February 28, 2007

Respectfully submitted,

21 DENNIS J. HERRERA
City Attorney
22 ELIZABETH S. SALVESON
Chief Labor Attorney
23 LAWRENCE HECIMOVICH
24 ADELMISE ROSEMÉ WARNER
Deputy City Attorneys

25 By: 
26 ADELMISE ROSEMÉ WARNER

27 Attorneys for Defendants
28 CITY AND COUNTY OF SAN FRANCISCO and
HEATHER FONG

PROOF OF SERVICE

Harmston, Clayton, et al. v. CCSF, et al.
SF Superior Court Case No. 06-454955

I, BLANCA MARTIN, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On February 28, 2007, I served the following document(s):

- **NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. SECTIONS 1441 AND 1446; STATEMENT OF JURISDICTION**

on the following persons at the location specified:

Aldon Bolaños, Esq.
Waukeen Q. McCoy, Esq.
Law Offices of Waukeen Q. McCoy
703 Market Street, Suite 1407
San Francisco, CA 94111
Facsimile No. (415) 675-2530

in the manner indicated below:

BY PERSONAL SERVICE: I sealed true and correct copies of the above document in an addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above location by a professional messenger service. A declaration from the messenger who made the delivery is attached or will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed February 28, 2007, at San Francisco, California.



BLANCA MARTIN

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EXHIBIT "A"

ENDORSED
FILED
San Francisco County Superior Court

AUG 10 2006

GORDON PARK-LI, Clerk
CASE MANAGEMENT CONFERENCE SBT/A
Deputy Clerk

1 WAUKEEN Q. McCOY, ESQ. (SBN: 168228)
LAW OFFICES OF WAUKEEN Q. McCOY
703 Market Street, Suite 1407
2 San Francisco, California 94103
Telephone (415) 675-7705
3 Facsimile (415) 675-2530

4 Attorney for Plaintiffs
CLAYTON HARMSTON et al.

JAN 12 2007 - 9⁰⁰ AM

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
DEPARTMENT 212

7 CITY AND COUNTY OF SAN FRANCISCO

9 CLAYTON HARMSTON, an individual; GIGI)
GEORGE, an individual; JAMES LEWIS, an)
10 individual; MIKE EVANSON, an individual,)
ERICK SOLARES, an individual; DAVE)
11 PARRY, an individual; ANDREW COHEN,)
an individual; NOAH MALLINGER, an)
12 individual; CARLOS MUSTAFICH, an)
individual; LUIS DEJESUS, an individual;)
13 JAMES D. AHERNE, an individual; JASON)
KIRCHNER, an individual; REGINALD)
14 SCOTT, an individual; GERALD P. LYONS,)
an individual; WENDY HURLEY, an)
16 individual; HOLLY STOUMEN, an individual;)
CHRISTINE ARNDT, an individual;)
17 SHAREEF NASIR, an individual)

18 Plaintiffs,

19 vs.

21 CITY AND COUNTY OF SAN FRANCISCO,)
HEATHER FONG, an individual, and DOES)
22 1-50)

23 Defendants,)
24)
25)
26)
27)
28)

Case No. CGC-06-454955

UNLIMITED JURISDICTION

COMPLAINT FOR:

- 1. RACIAL DISCRIMINATION
- 2. RETALIATION
- 3. DEFAMATION
- 4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

TWENTY (20) MILLION DOLLARS DEMANDED

JURY TRIAL DEMANDED

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1 Plaintiffs allege as follows:

2 **INTRODUCTION**

3 1. This is an action for damages for Racial Discrimination, Defamation, and
4 Intentional Infliction of Emotional Distress. This action arises out of events involving Plaintiffs
5 CLAYTON HARMSTON et al. (hereafter "Plaintiffs") and Defendant City and County of San
6 Francisco (hereafter "defendant" or "THE CITY"). Plaintiffs were employed by the City and
7 County of San Francisco in San Francisco. Therefore, jurisdiction in San Francisco County is
8 appropriate.

9 **THE PARTIES**

10 2. Clayton Harmston ("Harmston") is a non-Asian individual employed by THE
11 CITY as a Police Officer. THE CITY has employed HARMSTON for six years, both as a police
12 officer and as a Field Training Officer. In 2003, he received the Medal of Valor and a Purple
13 Heart. The American Legion named him Officer of the Year. HARMSTON has also won the
14 California Peace Officers' Association Valor Award. HARMSTON suffered a pattern and
15 practice of racial discrimination, and other wrongful acts committed by defendants.

16 3. Gigi George ("George") is a non-Asian individual employed by THE CITY as a
17 Police Officer. THE CITY has employed GEORGE for eleven years. Beyond her duties as an
18 Officer, GEORGE has been a liaison between the Police and San Francisco schools, and has
19 worked directly with the Office of the City Attorney. GEORGE suffered a pattern and practice
20 of racial discrimination, and other wrongful acts committed by defendants.

21 4. James Lewis ("Lewis") is a non-Asian individual employed by THE CITY as a
22 Police Officer. THE CITY has employed LEWIS for twenty-four years. LEWIS has spent his
23 career both as an Officer and as a Housing officer for the San Francisco Police. LEWIS suffered
24 a pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

25 5. Mike Evanson ("Evanson") is a non-Asian individual employed by THE CITY as
26 a Police Officer. THE CITY has employed EVANSON for twenty-five years. He has served
27 beyond his duties as an officer, acting as a Field Training Officer and Training Coordinator, and
28 as a Weapon of Mass Destruction Instructor. At the time of his suspension, EVANSON was

1 preparing an officer safety course in response to the recent murder of another Bayview District
2 Police Officer. As well, Officer EVANSON has received a Bronze Medal of Valor, three
3 Meritorious Conduct Awards, eight Police Commission Commendations, two Unit Citations, and
4 over one hundred Captain's Complimentary Reports. EVANSON suffered a pattern and practice
5 of racial discrimination, and other wrongful acts committed by defendants.

6 6. Erick Solares ("Solares") is a non-Asian individual employed by THE CITY as a
7 Police Officer. THE CITY has employed SOLARES for seven years. SOLARES has been a
8 dedicated officer, taking part in the Cease Fire Program, as well as undertaking plainclothes
9 positions and participating in the Robbery Apprehension Team, which responds to bank
10 robberies in progress. SOLARES suffered a pattern and practice of racial discrimination, and
11 other wrongful acts committed by defendants.

12 7. David Parry ("Parry") is a non-Asian individual employed by THE CITY as a
13 Police Officer. THE CITY has employed PARRY for eight years. During his career, PARRY
14 has won the American Legion Police Officer of the Year award (2003), and the Police Officers'
15 Association Medal of Valor (2003). Parry is also a Field Training Officer. PARRY suffered a
16 pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

17 8. Andrew Cohen ("Cohen") is a non-Asian individual employed by THE CITY as a
18 Police Officer. THE CITY has employed COHEN for eleven years. During this time, COHEN
19 produced a variety of videos for the Police Department and THE CITY, including documentaries
20 and other satirical videos. COHEN's superiors and peers encouraged his artistic abilities, noting
21 that they were morale boosters for other officers. COHEN suffered a pattern and practice of
22 racial discrimination, and other wrongful acts committed by defendants.

23 9. Noah Mallinger ("Mallinger") is a non-Asian individual employed by THE CITY
24 as a Police Officer. THE CITY has employed the Plaintiffs for nine years. As an officer
25 stationed in the Bayview neighborhood, MALLINGER has volunteered beyond his duties as a
26 police officer. MALLINGER participated in the Police Department's Cease Fire Project, an
27 effort to decrease violence the Bayview neighborhood. As well, he has taken part in gift drives
28 at Bayview Housing, has taken disadvantaged children to sporting events, and has visited ill

1 children in local hospitals. MALLINGER suffered a pattern and practice of racial
2 discrimination, and other wrongful acts committed by defendants.

3 10. Carlos Mustafich ("Mustafich") is a non-Asian individual employed by THE
4 CITY as a Police Officer. THE CITY has employed MUSTAFICH for seven years. During this
5 time, MUSTAFICH worked in the Cease Fire Project, an effort to decrease violence the Bayview
6 neighborhood. MUSTAFICH suffered a pattern and practice of racial discrimination, and other
7 wrongful acts committed by defendants.

8 11. Luis DeJesus ("DeJesus") is a non-Asian individual employed by THE CITY as a
9 Police Officer. THE CITY has employed DEJESUS for eight years. During this time,
10 DEJESUS worked in the Cease Fire Project, an effort to decrease violence the Bayview
11 neighborhood. He also volunteered with the Police Athletic League's fishing program. As an
12 officer, he received a Medal of Valor, two Police Commission Commendations, and two
13 Meritorious Conduct awards. DEJESUS suffered a pattern and practice of racial discrimination,
14 and other wrongful acts committed by defendants.

15 12. James D. Aherne ("Aherne") is a non-Asian individual employed by THE CITY
16 as a Police Officer. THE CITY has employed AHERNE for eight years. During this time, he
17 took part in the Cease Fire Project, an effort to reduce violence in the Bayview neighborhood.
18 AHERNE suffered a pattern and practice of racial discrimination, and other wrongful acts
19 committed by defendants.

20 13. Jason Kirchner ("Kirchner") is a non-Asian individual employed by THE CITY
21 as a Police Officer. THE CITY has employed KIRCHNER for four years. During this time, he
22 has been recommended several times for the Medal of Valor. He has received dozens of
23 Captains' Complimentary Reports, and received a Unit Citation for Work and Valor during the
24 Iraq riots. KIRCHNER suffered a pattern and practice of racial discrimination, and other
25 wrongful acts committed by defendants.

26 14. Reginald Scott ("Scott") is a non-Asian individual employed by THE CITY as a
27 Police Officer. THE CITY has employed SCOTT for six years. He earned the Medal of Valor,
28 the Chief's Award, and the Humanitarian award during his time at the Police Department. Prior

1 to his tenure with the San Francisco Police, SCOTT worked in the San Francisco Sheriff's
2 Department. In that position, he was named Deputy of the Year in 1998. SCOTT suffered a
3 pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

4 15. Gerald P. Lyons ("Lyons") is a non-Asian individual employed by THE CITY as
5 a Police Officer. THE CITY has employed LYONS for thirteen years. During this time, LYONS
6 served as a plainclothes officer at both the Taraval and Bayview Stations. LYONS suffered a
7 pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

8 16. Wendy Hurley ("Hurley") is a non-Asian individual employed by THE CITY as a
9 Police Officer. THE CITY has employed HURLEY for ten years. HURLEY suffered a pattern
10 and practice of racial discrimination, and other wrongful acts committed by defendants.

11 17. Holly Stoumen ("Stoumen") is a non-Asian individual employed by THE CITY
12 as a Police Officer. THE CITY has employed STOUMEN for six years. In her career,
13 STOUMEN has undertaken a variety of leadership and training positions, including being a Field
14 Training Officer Instructor at the Police Academy. She also taught an Officer Safety and Field
15 Tactics Course focused on schools and the workplace that all San Francisco Police Officers must
16 take. STOUMEN is also a member of the Cease Fire Program. STOUMEN suffered a pattern
17 and practice of racial discrimination, and other wrongful acts committed by defendants.

18 18. Christine Arndt ("Arndt") is perceived to be a non-Asian individual employed by
19 THE CITY as a Police Officer. THE CITY has employed ARNDT for eight years. During her
20 career, she has worked undercover and as a uniformed officer, and has on several occasions
21 requested transfers to work in Bayview, one of the most difficult areas for San Francisco Police.
22 She received many Captain's Complimentary Reports, and a Police Commission Commendation
23 Award. ARNDT suffered a pattern and practice of racial discrimination and other wrongful acts
24 committed by defendants.

25 19. Shareef Nasir ("Nasir") is a non-Asian individual or perceived to be non-Asian,
26 and employed by THE CITY as a Police Officer. THE CITY has employed NASIR for several
27 years. Plaintiff suffered a pattern and practice of racial discrimination, and other wrongful acts
28 committed by defendants.

1 Hunter's-Point Station. THE CITY and FONG did not suspend any of the Plaintiffs' Asian
2 (Chinese-American) co-workers, who also participated in the video.

3 27. Plaintiffs are informed and believe and thereon allege that because of Plaintiffs'
4 participation in the video, THE CITY and FONG suspended them, and required Plaintiffs to turn
5 in their police IDs, badges, and weapons. Because of their suspension, Plaintiffs lost significant
6 amounts of pay, accrual of sick leave, vacation time, and other benefits. Some of the Plaintiffs
7 lost their overtime pay and Field Training Officer pay from the start of their suspension to the
8 present, costing them tens of thousands of dollars in lost earnings.

9 28. Plaintiffs are informed and believe and thereon allege that before, during, and
10 after their suspensions, THE CITY and FONG publicly insulted Plaintiffs, accusing them of
11 being racist, sexist, and homophobic, which is not true. In some cases, defendants posted
12 pictures of Plaintiffs alongside the comments, increasing the humiliation Plaintiffs suffered.
13 Defendants did this repeatedly, in print, on the radio, and on television, in local, regional, and
14 national media outlets. Defendants did not make these comments about the Asian officers who
15 participated in the video.

16 29. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
17 acted outside of required procedures by suspending and insulting Plaintiffs. Rather than
18 conducting a formal investigation, filing charges, or convening a Chief's Hearing, on December
19 8, 2005, and other dates, THE CITY and FONG groundlessly suspended, and publicly insulted
20 Plaintiffs. This inappropriate response to the video violates the San Francisco Charter and the
21 San Francisco Police Department General Order, requiring a formal investigation, filing of
22 charges, and a hearing underway before the Police Commission for all allegations of misconduct
23 to properly suspend a Police Officer.

24 30. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
25 did not use a valid, non-discriminatory criterion to determine Plaintiffs' discipline. Plaintiffs
26 wrote to Defendants on July 13, 2006 and July 19, 2006 in an attempt to determine Defendants'
27 criterion for disciplining Plaintiffs. Defendants refused to provide any criterion used in
28

1 Plaintiffs' discipline which justified the omission of Plaintiffs' Asian (Chinese-American)
2 counterparts from any discipline. Defendants failed even to acknowledge Plaintiffs' reasonable
3 requests. See the letters attached as Exhibit A.

4 31. Plaintiffs are informed and believe and thereon allege that because of the acts of
5 FONG and THE CITY, they have all suffered extreme humiliation and embarrassment. Being
6 suspended from work, losing pay, and being publicly disgraced has taken a great toll on
7 Plaintiffs, including loss of friendships, alienation from family members, and straining
8 marriages, not to mention plaintiffs' personal feelings of fear, shame, and anger.

9
10 **FIRST CAUSE OF ACTION AGAINST DEFENDANT THE CITY**

11 **RACE DISCRIMINATION**

12 **Cal. Govt. Code § 12940**

13 **[AS TO ALL PLAINTIFFS]**

14 32. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
15 31 above.

16 33. Defendants, through their agents and employees, engaged in a pattern and practice
17 of unlawful racial discrimination in violation of the Fair Employment and Housing Act
18 (hereinafter referred to as "FEHA") in connection with its treatment of Plaintiffs and the terms
19 and conditions of their employment. Defendants used race as a basis to determine discipline
20 regarding the video. Specifically, Defendants disciplined only the non-Asian officers, and those
21 perceived to be non-Asian, who were involved in the video.

22 34. At all relevant times, defendants had actual and constructive knowledge of the
23 discriminatory conduct described and alleged herein, and condoned, ratified and participated in
24 the discrimination. Because of the hostile and offensive work environment perpetrated and
25 maintained by defendants, and their failure to protect Plaintiffs from further discrimination,
26 Plaintiffs suffered severe emotional distress.

27 35. Plaintiffs are informed and believe and thereon allege that in addition to the
28 practices enumerated above, defendants, and each of them, have engaged in other discriminatory

1 practices against Plaintiffs, which are not yet fully known. When said discriminatory practices
2 become known to Plaintiffs, they will seek leave of court to amend this complaint in those
3 regards.

4 36. As a direct and proximate result of the willful, knowing, and intentional
5 discrimination against Plaintiffs, and the failure to act by defendants, Plaintiffs have suffered
6 mental distress, anguish, and indignation. Plaintiffs are thereby entitled to general and
7 compensatory damages in an amount to be proven at trial.

8 37. Defendants' acts alleged herein are malicious, oppressive, despicable, and in
9 conscious disregard of Plaintiffs' rights. As such, punitive damages are warranted against
10 defendants in order to punish and make an example of their actions.

11 **SECOND CAUSE OF ACTION AGAINST**
12 **DEFENDANTS CITY, FONG, AND DOES 1-50**

13 **RETALIATION**

14 **Cal. Govt. Code §12940**

15 **IAS TO PLAINTIFFS EVANSON, PARRY, and HARMSTON**

16 38. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
17 37 above.

18 39. Plaintiffs are informed and believe and thereon allege that defendants THE CITY
19 and FONG engaged in retaliatory conduct in violation of public policy against Plaintiffs for
20 opposing unlawful practices under FEHA.

21 40. Plaintiffs are informed and believe and thereon allege that THE CITY through its
22 agent and employee FONG retaliated against Plaintiffs in violation of California Government
23 Code §12940. Defendants did so by materially changing the employment conditions of
24 Plaintiffs EVANSON, PARRY, and HARMSTON after they filed Notices of Tort Claims for
25 their race discrimination claims related to their suspensions.

26 41. Plaintiffs are informed and believe and thereon allege that on May 31, 2006,
27 Plaintiffs filed Notices of Tort Claims against defendants THE CITY and FONG. On June 20,
28 2006, Plaintiffs EVANSON, PARRY, and HARMSTON were transferred from their previous

1 positions to the O.P.S. Center, and were given different, odd-hour, schedules, in violation of their
2 contracts. Plaintiffs' new positions were regarded as highly undesirable, and their new hours
3 restricted Plaintiffs' ability to provide childcare.

4 42. Plaintiff is informed and believes and thereon alleges that in addition to the
5 enumerated adverse actions above, defendants, and each of them, have engaged in other unlawful
6 practices against EVANSON, PARRY, and HARMSTON which are not yet fully known. When
7 said practices become known to Plaintiffs, they will seek leave to amend this complaint in those
8 regards.

9 43. As a direct and proximate result of defendants' willful, knowing, and intentional
10 acts, and defendants' failure to act, EVANSON, PARRY, and HARMSTON have suffered and
11 will continue to suffer mental distress, anguish, and indignation. EVANSON, PARRY, and
12 HARMSTON are thereby entitled to general and compensatory damages in an amount to be
13 proven at trial.

14 44. Defendants' acts alleged herein are malicious, oppressive, despicable, and in
15 conscious disregard of EVANSON, PARRY, and HARMSTON's rights. As such, punitive
16 damages are warranted against defendants in order to punish and make an example of them.

17 **THIRD CAUSE OF ACTION AGAINST**

18 **DEFENDANTS CITY, FONG AND DOES 1-50**

19 **DEFAMATION**

20 **[AS TO ALL PLAINTIFFS]**

21 45. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
22 44 above.

23 46. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
24 repeatedly publicized, or caused to be publicized, to third persons false allegations concerning
25 Plaintiffs. These false allegations include but are not limited to allegations that they are bigots.

26 47. Plaintiffs are informed and believe and thereon allege that the defendants made
27 accusations directly concerning Plaintiffs and were so understood by all persons involved in the
28 publication.

1 48. Plaintiffs are informed and believe and thereon allege that these accusations were
2 defamatory per se because they accused Plaintiffs of being racist, sexist, and homophobic. The
3 accusations stated above, by natural consequence, cause actual damage to Plaintiffs both
4 personally and professionally.

5 49. Plaintiffs are informed and believe and thereon allege that these accusations were
6 false because Plaintiffs are not racist, sexist, or homophobic.

7 50. Plaintiffs are informed and believe and thereon allege that furthermore, THE
8 CITY and FONG made these accusations knowing that they were false.

9 51. Plaintiffs are informed and believe and thereon allege that as a proximate result of
10 the above-described accusations, Plaintiffs have suffered loss of their reputation, shame,
11 mortification, and hurt feelings, all to their general damage in an amount according to proof.

12 52. Plaintiffs are informed and believe and thereon allege that the above-described
13 accusations were publicized by defendants because of the defendants' rash and irrational
14 response to public pressure. Defendants made the accusations without any investigation, thereby
15 justifying an award of punitive damages against defendants in an amount appropriate to punish
16 defendants for their wrongful conduct and to deter others from engaging in such conduct.

17 **FOURTH CAUSE OF ACTION AGAINST**

18 **DEFENDANTS CITY, FONG AND DOES 1- 50**

19 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

20 **[AS TO ALL PLAINTIFFS]**

21 53. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
22 52 above.

23 54. Plaintiffs are informed and believe and thereon allege that THE CITY by and
24 through its agents, employees and defendants FONG and DOES 1-50 acted without regard to the
25 health and safety of Plaintiffs, and each of them treated Plaintiffs in the deplorable manner
26 alleged herein.

27 55. Plaintiffs are informed and believe and thereon allege that Defendants spoke
28 about the video on local and national news outlets. Making public statements regarding a private

1 personnel matter constitutes extreme and outrageous conduct. Furthermore, acting in a
2 discriminatory manner is extreme and outrageous conduct in a civil society.

3 56. Plaintiffs are informed and believe and thereon allege that defendants, standing in
4 a position of authority over Plaintiffs, deliberately acted without regard to Plaintiffs' health,
5 safety, or well-being, causing them severe emotional and physical distress.

6 57. Plaintiffs are informed and believe and thereon allege that as a proximate result of
7 defendants' extreme and outrageous acts, Plaintiffs suffered severe emotional distress in the form
8 of humiliation, embarrassment, mental-anguish, anxiety, stress and indignation. Defendants
9 acted with the willful knowledge that Plaintiffs would suffer severe harm as a result.

10 58. Plaintiffs are informed and believe and thereon allege that defendants' acts alleged
11 herein are malicious, oppressive, despicable, and in conscious disregard of Plaintiffs' rights. As
12 such, punitive damages are warranted against defendants in order to punish them and make an
13 example of their actions.

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PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for relief as follows:

1. For general damages in excess of twenty (20) million dollars and in no event less than the jurisdictional limit of this court;
2. For special damages in amounts according to proof;
3. For punitive damages in amounts according to proof;
4. For attorneys' fees as provided by law;
5. For a mandatory injunction requiring defendants to reinstate Plaintiffs to their previous positions without record of the adverse employment actions taken by defendants, pursuant to Government Code §12970(a);
6. For interest as provided by law;
7. For costs of suit incurred herein; and
8. For such other and further relief as the Court deems fair and just.

Dated: August 10, 2006

LAW OFFICES OF WAUKEEN Q. McCOY

By _____
WAUKEEN Q. McCOY
Attorney for Plaintiffs

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EXHIBIT A

700 Market Street, Suite 1407
San Francisco, CA 94103
Web: www.waukeenmccoy.com

Law Offices of
Waukeen Q. McCoy

Phone: 415. 775. 0710
Fax: 415. 775. 1337
Email: waukeen@waukeenmccoy.com

July 13, 2006

Larry Hecimovich, Esq.
San Francisco City Attorney's Office
875 Stevenson St., RM 440
San Francisco, CA 94103

RE: SFPD Video Plaintiffs

Dear Mr. Hecimovich, Esq.:

Thank you for speaking with me today via telephone. In our communications, you mentioned that you knew of the criterion used that determined the discipline of my clients; you stated that race was not a factor. Please outline the criterion that was used as a basis to discipline my clients, which will justify why none of the Asian officers (Chinese Americans) were disciplined that participated in the video. Please respond no later than Monday, July 17, 2006. If we do not receive a response, we will assume that our request has been rejected and that there was no criterion used at the time of the disciplines. Please be advised that I did not expect for you to admit that race was a factor, even though our position is that race was a factor.

Thank you for your prompt attention in this matter.

LAW OFFICES OF WAUKEEN MCCOY

WAUKEEN MCCOY, ESQ.

1736 Market Street, Suite 1407
San Francisco, CA 94103
Tel: 415.398.1100 Fax: 415.398.1101

Law Offices of
Waukeen Q. McCoy

Phone: 415.398.1100
Fax: 415.398.1101
Email: Waukeen@wqmccoy.com

July 19, 2006

Larry Hecimovich, Esq.
San Francisco City Attorney's Office
875 Stevenson St., RM 110
San Francisco, CA 94103

RE: SFPDA Videogame Plaintiffs

Dear Mr. Hecimovich:

This is a follow-up to my July 13, 2006 letter to you regarding the criterion used that determined the discipline of my clients. You have failed to respond. I take this failure to respond to mean that your client had no valid criterion for disciplining my clients.

Again, if you indeed knew of the criterion used to determine the discipline, please let me know immediately. If no response is provided, we will assume that any reason offered at a later date is a pretext for discrimination.

We would like to review this information so that we can avoid protracted litigation, if possible. Please provide the information, if any, immediately.

Thank you for your immediate attention in this matter.

LAW OFFICES OF WAUCKEEN MCCOY

WAUCKEEN MCCOY

EXHIBIT "B"

COPY

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 ELIZABETH S. SALVESON, State Bar # 83788
Chief Labor Attorney
3 LAWRENCE HECIMOVICH, State Bar #129688
Deputy City Attorney
4 Fox Plaza
1390 Market Street, 5th Floor
5 San Francisco, California 94102-5408
Telephone: (415) 554-3933
6 Facsimile: (415) 554-4248

ENDORSED
FILED
San Francisco County Superior Court

SEP 18 2006

GORDON PARK-LI, Clerk
BY: MARYANN MORAN
Deputy Clerk

7 Attorneys for Defendants
8 CITY AND COUNTY OF SAN FRANCISCO and
HEATHER FONG
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED JURISDICTION

13 CLAYTON HARMSTON, an individual; GIGI
14 GEORGE, an individual; JAMES LEWIS, an
individual; MIKE EVANSON, an individual;
15 ERIK SOLARES, an individual; DAVE PARRY,
an individual; ANDREW COHEN, an individual;
16 NOAH MALLINGER, an individual; CARLOS
MUSTAFICH, an individual; LUIS DEJESUS, an
17 individual; JAMES D. AHERNE, an individual;
JASON KIRCHNER, an individual; REGINALD
18 SCOTT, an individual; GERALD P. LYONS, an
individual; WENDY HURLEY, an individual;
19 HOLLY STOUMEN, an individual; CHRISTINE
ARNDT, an individual; SHAREEF NASIR, an
individual

Case No. 06-454955

DEFENDANTS' ANSWER TO
PLAINTIFFS' UNVERIFIED
COMPLAINT

Date Action Filed: August 10, 2006

20 Plaintiffs,

21 vs.

22 CITY AND COUNTY OF SAN FRANCISCO,
23 HEATHER FONG, an individual, and DOES 1-50,

24 Defendants.

GENERAL DENIAL

1
2 Defendants City and County of San Francisco and Heather Fong, Chief of the San Francisco
3 Police Department, hereby answer Plaintiffs' unverified Complaint ("Complaint") and generally
4 deny each and every allegation thereof and, further, deny that Plaintiffs have been or will be
5 damaged in any sum or at all.

6 In addition, Defendants allege the following separate and affirmative defenses:

7 **AFFIRMATIVE DEFENSES**

8 **FIRST AFFIRMATIVE DEFENSE**

9 **(Failure to State A Claim)**

10 As an affirmative defense, Defendants assert that Plaintiffs have failed to state a claim upon
11 which relief can be granted.

12 **SECOND AFFIRMATIVE DEFENSE**

13 **(Statute of Limitations)**

14 As an affirmative defense, Defendants assert that Plaintiffs' claims are barred in whole or in
15 part by the applicable statutes of limitations.

16 **THIRD AFFIRMATIVE DEFENSE**

17 **(Immunity, Qualified Immunity and Privilege)**

18 As an affirmative defense, Defendants assert that the City is a public entity and therefore
19 Defendants have the benefit of immunities and privileges contained in California Government Code
20 sections 815 *et seq.* and 820 *et seq.*, the United States Constitution, and Federal/State
21 common/statutory law.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 **(Equitable Defenses)**

24 As an affirmative defense, Defendants assert that all or part of Plaintiffs' claims are barred
25 by the equitable doctrines of waiver, laches, estoppel and unclean hands.
26
27
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FIFTH AFFIRMATIVE DEFENSE

(Claim Presentation)

As an affirmative defense, Defendants assert that Plaintiffs have failed to fully comply with the requirements of the California Tort Claims Act as contained in the California Government Code.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative/Contractual Remedies)

As an affirmative defense, Defendants assert that all or part of this action is barred due to Plaintiffs' failure to exhaust administrative and/or contractual remedies as required under federal and/or state law.

SEVENTH AFFIRMATIVE DEFENSE

(Legitimate Non-Discriminatory, Non-Retaliatory Reasons for Employment Decision)

As an affirmative defense, Defendants assert that any and all employment actions taken with respect to Plaintiffs were not based on any illegal consideration, but rather were based on one or more legitimate, sufficient, non-discriminatory, non-retaliatory reasons.

EIGHTH AFFIRMATIVE DEFENSE

(Qualified Immunity)

As a separate and affirmative defense, Defendants allege that the actions complained of are protected by the doctrine of qualified immunity.

NINTH AFFIRMATIVE DEFENSE

(Reasonable Steps)

As an affirmative defense, Defendants assert that the City promptly took all reasonable/necessary steps to remedy any discrimination, retaliation, or any other alleged wrongful or inappropriate conduct as alleged by Plaintiffs and that Plaintiffs unreasonably failed to take advantage of any preventative or corrective procedures provided by Defendants or to take other steps to avoid harm.

TENTH AFFIRMATIVE DEFENSE

(Honest and Mistaken Belief)

As an affirmative defense, Defendants assert that if they did violate any statute or other law (which Defendants expressly deny), Defendants cannot be liable for any damages Plaintiffs may have sustained because Defendants had an honest but mistaken belief that there was sufficient and adequate cause for the actions taken with respect to Plaintiffs and their employment with Defendants.

ELEVENTH AFFIRMATIVE DEFENSE

(Workers Compensation)

As an affirmative defense, Defendants assert that to the extent Plaintiffs have a claim for damages, it is barred by the exclusivity provisions of the Workers' Compensation Act.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

As an affirmative defense, Defendants assert that Plaintiffs have had, and continue to have, the ability and opportunity to mitigate the damages alleged in the Complaint and have failed to act reasonably to mitigate any such damages.

THIRTEENTH AFFIRMATIVE DEFENSE

(Fair Responsibility Act)

As an affirmative defense, Defendants assert that Plaintiffs' recovery, if any, is limited to the percentage of fault, if any, attributable to Defendants as provided in the Fair Responsibility Act of 1986, California Civil Code sections 1431-1431.5.

FOURTEENTH AFFIRMATIVE DEFENSE

(Other's Conduct)

As an affirmative defense, Defendants assert that any recovery is barred because Plaintiffs' damages, if any, were caused by the intentional, reckless or negligent acts, omissions and/or misconduct of Plaintiffs or a third party.

FIFTEENTH AFFIRMATIVE DEFENSE

(Discrimination)

As an affirmative defense, Defendants allege that they exercised reasonable care to prevent and promptly correct any discrimination and Plaintiffs unreasonably failed to take advantage of any preventative or corrective procedures provided by Defendants or take other steps to avoid harm.

WHEREFORE, Defendants pray for judgment a follows:

1. That Plaintiffs take nothing from Defendants;
2. That the complaint be dismissed with prejudice;
3. That Defendants recover costs of suit herein, including attorney's fees; and
4. For such other relief as is just and proper.

Dated: September 18, 2006

DENNIS J. HERRERA
 City Attorney
 ELIZABETH S. SALVESON
 Chief Labor Attorney
 LAWRENCE HECIMOVICH
 Deputy City Attorney

By



 LAWRENCE HECIMOVICH

Attorneys for Defendants
 CITY AND COUNTY OF SAN FRANCISCO and
 HEATHER FONG

PROOF OF SERVICE

Harmston, Clayton, et al. v. CCSF, et al.
SF Superior Court Case No. 06-454955

I, LISA HARRIS, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On September 18, 2006, I served the following document(s):

DEFENDANTS' ANSWER TO PLAINTIFFS' UNVERIFIED COMPLAINT

on the following persons at the locations specified:

Waukeen Q. McCoy, Esq.
Law Offices of Waukeen Q. McCoy
703 Market Street, Suite 1407
San Francisco, CA 94111

in the manner indicated below:

BY UNITED STATES MAIL: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

BY PERSONAL SERVICE: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. A declaration from the messenger who made the delivery is attached or will be filed separately with the court.

BY OVERNIGHT DELIVERY: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

BY FACSIMILE: Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number Fax # to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission report is attached or will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed September 18, 2006, at San Francisco, California.



LISA HARRIS