



CITY ATTORNEY DENNIS HERRERA NEWS RELEASE

FOR IMMEDIATE RELEASE
TUESDAY, NOVEMBER 20, 2007

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Herrera Sues City's Elections Vendor, Alleging Fraud, False Claims, Breach of Contract

***In Litigation Against 'World's Largest' Voting Systems Provider, S.F. Seeks
Damages, Penalties and Costs That Could Reach Into the Millions of Dollars***

SAN FRANCISCO (Nov. 20, 2007)—City Attorney Dennis Herrera filed suit against the City's voting systems vendor today, charging Omaha, Neb.-based Election Systems & Software, Inc. with a panoply of wrongdoing that includes fraud, breach of contract, negligent misrepresentation and multiple violations of California's Elections Code, False Claims Act and Unfair Competition Law. In a 23-page civil complaint filed in San Francisco Superior Court this morning, Herrera detailed a months-long pattern of misrepresentations and voting system problems by ES&S that caused California Secretary of State Debra Bowen to impose stringent conditions on the City's use of the company's voting machines to conduct its municipal election earlier this month. Because of those restrictions, San Francisco election officials were forced to tabulate ballots centrally; to remake thousands of ballots by hand; and to borrow equipment from another county. City elections officials were unable to release election results from the polling places on election night as is the ordinary practice, and do not expect to announce final results for San Francisco's municipal election until Dec. 4, 2007—fully four weeks after Election Day.

"San Francisco's experience with ES&S raises extremely troubling questions, not simply about the integrity of this company's technology, but about the integrity of this company itself," said Herrera. "There can be no more important duty in a representative democracy than to conduct elections, and it is a travesty to see that duty so flagrantly undermined by the fraudulent conduct of an election systems vendor. This is an injustice that cries out for a strong response, and I intend to aggressively litigate the City's interests under our contract and under the law."

Today's lawsuit makes good on Herrera's threat to sue in a letter to ES&S President and CEO Aldo Tesi the day after the Nov. 6 election, in which the City Attorney gave the company until yesterday to cure its contractual breaches and commit to compensate the City for added costs. ES&S refused. Herrera's civil action seeks damages, civil penalties and all legal costs to be determined at trial, but which could reach well into millions of dollars based on the causes of action alleged. Under California law, violations of the False Claims Act alone can result in damages equal to three times the amount of actual damages suffered by a successful plaintiff—in addition to legal costs and fees.

Describing itself on its Web site as "the world's largest and most experienced provider of total election management solutions with more than 170,000 systems installed worldwide," ES&S has come under fire from watchdog organizations and elections administrators with increasing regularity in recent months. The State of Colorado last month suspended its certification process of ES&S's voting system, citing "a

[MORE]

history of coordination issues with your company.” Yesterday, California Secretary of State Bowen filed a separate lawsuit against ES&S seeking damages of up to \$50,000 per violation plus reimbursement of the amounts paid by the counties for the company’s sale of 972 AutoMark A200 voting machines that had not been certified for use to the Counties of Colusa, Marin, Merced and Solano as well as the City and County of San Francisco.

Herrera’s case is *City and County of San Francisco et al v. Election System and Software, Inc.*, San Francisco Superior Court, filed Nov. 20, 2007.

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10 CITY AND COUNTY OF SAN FRANCISCO,
JOHN ARNTZ and DENNIS J. HERRERA
11 on behalf of THE PEOPLE OF
THE STATE OF CALIFORNIA

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO
14 UNLIMITED JURISDICTION
15

16 CITY AND COUNTY OF SAN
FRANCISCO, a municipal corporation
17 and a political subdivision of the State of
California, JOHN ARNTZ, Director of the
18 Department of Elections for the City and
County of San Francisco, and THE
19 PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through
20 City Attorney Dennis J. Herrera,

21 Plaintiffs,

22 vs.

23 ELECTION SYSTEMS AND
SOFTWARE, INC., a Delaware
24 corporation,

25 Defendant.
26
27
28

Case No.

**COMPLAINT FOR DAMAGES,
PENALTIES, AND INJUNCTIVE
RELIEF**

1. **BREACH OF CONTRACT;**
2. **FRAUD;**
3. **NEGLIGENT
MISREPRESENTATION;**
4. **VIOLATIONS OF CALIFORNIA
ELECTIONS CODE § 18564.5;**
5. **VIOLATIONS OF THE
CALIFORNIA FALSE CLAIMS
ACT (CAL. GOV'T CODE §§ 12650
et seq.);**
6. **VIOLATIONS OF THE UNFAIR
COMPETITION ACT (CAL. BUS.
& PROF. CODE §§ 17200 *et seq.*);**

(DEMAND FOR JURY TRIAL)

INTRODUCTION

1
2 1. Plaintiff City and County of San Francisco ("San Francisco" or "the City") conducts
3 elections to consider candidates for local, state, and federal offices, local and state ballot initiatives,
4 and political primaries—including three elections in the upcoming year (2008). San Francisco uses
5 electronic voting equipment to aid voters in marking paper ballots and to tabulate votes cast on
6 these paper ballots. For the past eight years, San Francisco has contracted with Defendant Election
7 Systems and Software, Inc. ("ES&S") to provide electronic voting equipment and voting services
8 that aid the City in conducting elections.

9 2. All voting equipment used in California must comply with applicable state and
10 federal law. State law requires that all voting equipment used in California be approved by the
11 California Secretary of State and be federally certified.

12 3. On December 30, 1999, San Francisco and ES&S entered into the Voting Systems
13 Project Agreement. The parties have amended the contract seven times. The December 30, 1999
14 Voting Systems Project Agreement, as amended, is hereafter referred to as the "Agreement." The
15 Agreement contains guarantees and assurances by ES&S that its voting system and equipment did
16 and would comply with all applicable state and federal law, including certification requirements.
17 ES&S has breached its obligations.

18 4. One of the pieces of voting equipment San Francisco purchased under the
19 Agreement was the "AutoMARK," a paper ballot-marking device designed for use by disabled
20 voters. The Agreement requires the AutoMARK machines that ES&S sold to San Francisco to have
21 been certified by the California Secretary of State, as state law requires. In April 2006, San
22 Francisco agreed to purchase 565 certified AutoMARK A100 machines at a cost of approximately
23 \$3.8 million. In May 2006, ES&S delivered to San Francisco 565 uncertified AutoMARK A200
24 machines; not the certified A100 machines. Unlike the A100 machines, the A200s contained
25 modified hardware, software and/or firmware that the Secretary of State had never certified for use
26 in California elections. Federal certification stickers on the AutoMARK machines delivered to San
27 Francisco, manuals and other written materials that ES&S provided with the uncertified A200
28 machines further represented that the machines were certified A100 machines. On November 19,

1 2007, the California Secretary of State released formal findings that the AutoMARKs ES&S sold
2 and delivered to San Francisco were uncertified, thus establishing that ES&S had breached the
3 Agreement and that its prior representations were false.

4 5. The AutoMARK is a component of the ES&S voting system that San Francisco uses.
5 In September 2007, the California Secretary of State, in considering whether to re-certify the ES&S
6 voting system used in San Francisco, separately announced that the voting system was unacceptably
7 prone to inaccuracies. To meet minimum standards of accuracy and reliability, the Secretary of
8 State administratively re-certified the system, for the November 2007 election only, on the
9 condition that San Francisco and ES&S comply with a number of restrictions. These restrictions
10 delayed the publication of final election results in the November 27 election and make San
11 Francisco's elections significantly more costly to conduct. The Secretary of State also required
12 ES&S to pay for all additional costs required to comply with the Secretary of State's re-certification
13 of the ES&S voting system. Despite the Secretary of State's express condition that ES&S bear the
14 costs of maintaining certification and ES&S's contractual obligations to abide by state laws and
15 requirements, ES&S has refused to pay for these costs.

16 6. On November 7, 2007, San Francisco sent ES&S a Notice of Default, confirming
17 San Francisco's assertions of ES&S's breaches of various contractual provisions and the City's
18 demand for cure. On November 19, 2007, ES&S responded to the City's Notice of Default without
19 acknowledging those breaches or offering to cure. Now, the breaches of contract outlined in the
20 Notice of Default, along with related claims of fraud, negligent misrepresentation, and violations of
21 the California Elections Code, False Claims Act, and the Unfair Competition Law, form the basis
22 for the instant suit.

23 **THE PARTIES**

24 7. Plaintiff San Francisco is a municipal corporation duly organized under the laws of
25 the State of California. San Francisco has more than 750,000 residents as determined by the
26 Demographic Research Unit of the State of California's Department of Finance.

27 8. Plaintiff John Arntz ("Arntz") is the Director of the Department of Elections for the
28 City. Under section 13.104 of the San Francisco Charter, the Director of the Department of

1 Elections administers the day-to-day conduct and management of the Department of Elections,
2 voter registration, and other matters involving elections in San Francisco.

3 9. Dennis J. Herrera, City Attorney for San Francisco, acting to protect the public from
4 unlawful business practices, brings this action in the name of the People of the State of California
5 under the statutes that prohibit unlawful, fraudulent and unfair business practices. California
6 Business and Professions Code sections 17204 and 17206(a) authorize him to bring this action.

7 10. Defendant ES&S is a corporation incorporated under the laws of the State of
8 Delaware, having its principal place of business in the State of Nebraska, that at all relevant times
9 was doing business in California.

10 VENUE

11 11. Venue is proper because a substantial part of the events or omissions giving rise to
12 the claim occurred in San Francisco. In addition, the Agreement states that "[v]enue for all
13 litigation relative to the formation, interpretation and performance of this Agreement shall be in San
14 Francisco." See Exhibit A, ¶ 56.

15 **I. ES&S'S SALE OF UNCERTIFIED VOTING MACHINES TO SAN FRANCISCO**

16 12. In 2006, ES&S sold San Francisco 565 AutoMARK voting machines. AutoMARK
17 voting machines are used by disabled voters to mark ballots; they do not count or tabulate votes.
18 San Francisco purchased the 565 AutoMARKs from ES&S for \$6,185.89 per machine, paying a
19 total purchase price of nearly \$3.8 million (\$3.495 million for the AutoMARK machines and
20 \$297,000 in state and local sales tax).

21 13. ES&S and San Francisco contracted for the purchase of the AutoMARKs in an
22 amendment to a previous agreement for voting equipment and services. Several years earlier, in
23 December 1999, ES&S entered into a contract with San Francisco to provide voting equipment and
24 voting services. See Exhibit A. As set forth in paragraph 3 above, the Agreement has been
25 amended on seven occasions, most recently in March 2007. See Exhibits B-H. The Fifth
26 Amendment, dated April 10, 2006, addressed the sale of the AutoMARK voting machines. See
27 Exhibit F.

1 14. Under state law, all voting equipment and systems must be certified by the California
2 Secretary of State before their use in an election. Through several provisions in the Agreement (as
3 amended through the Fifth Amendment), ES&S agreed that it would provide San Francisco with
4 AutoMARK voting machines that have been certified by the Secretary of State and that ES&S
5 would be responsible for all failures to do so:

- 6 • In the Fifth Amendment, ES&S specifically stated that the "accessible ballot-
7 marking voting system solution," *i.e.*, the AutoMARK it was selling to San
8 Francisco, would not require any "additional federal or state certification . . . for use
9 in the June 6, 2006 Election." Id. ¶ 17(f) (amending Section 20 of the Agreement).
10 ES&S and the City also agreed "that they [would] work together in good faith to
11 manage any and all certification requirements after the June 6, 2006 Election,"
12 further indicating that no additional efforts were necessary to achieve certification
13 for the June 6, 2006 election. Id.
- 14 • ES&S agreed to "keep itself fully informed of . . . all state, and federal laws in any
15 manner affecting the performance of this Agreement, and . . . at all times [to] comply
16 with . . . all applicable laws as they may be amended from time to time." Id. ¶ 17(i)
17 (amending Section 59.A of the Agreement).
- 18 • In the same section, ES&S agreed with regard to software that "[s]o long as City is
19 receiving ES&S software maintenance and support, the ES&S software shall be
20 maintained or upgraded by ES&S in such a way as to remain compliant with all
21 applicable federal and state election laws and regulations, including all current and
22 future requirements necessary to remain certified for use in the City's location." Id.
- 23 • ES&S also agreed that: "Pursuant to this Agreement and by order of the Secretary of
24 State, voting systems certified for use in California shall comply with all applicable
25 state and federal statutes, regulations, rules and requirements, including, but not
26 limited to, those voting system requirements set forth in the California Elections
27 Code" In this same section, ES&S assumed "full responsibility for any
28 representation" that the equipment sold to San Francisco "complies with all
applicable state and federal requirements referenced above." Id. ¶ 17(i) (amending
Section 59.B. of the Agreement).

15. ES&S violated these promises and guarantees by selling and delivering to San
Francisco AutoMARK voting machines that in fact were uncertified when ES&S sold and delivered
them. On August 3, 2005, the Secretary of State certified AutoMARK A100 machines for use in
California elections. Approximately six months later, San Francisco agreed to purchase 565 of the
recently certified A100 machines. Instead of receiving the certified A100 machines, in May 2006,
ES&S delivered to San Francisco 565 uncertified AutoMARK A200 machines. The Secretary of
State had never certified the A200 machines for use in California elections. Under state law, the

1 City cannot presently use those machines in future elections—despite paying ES&S approximately
2 \$3.8 million—because they are uncertified.

3 16. For San Francisco to use the AutoMARK machines for the November 2006 election,
4 ES&S was required to seek certification of the machines specifically for use in San Francisco's
5 Ranked Choice Voting ("RCV") elections. On October 26, 2006, the Secretary of State granted
6 ES&S conditional certification for one election (November 2006) for the RCV Enhanced System,
7 including the use of the AutoMARKs sold to San Francisco in April 2006. But the certification,
8 requested by ES&S and granted by the Secretary of State, was again for the A100 AutoMARKs, not
9 the A200 machines that San Francisco had unwittingly purchased.

10 17. On August 21, 2007, the California Secretary of State announced she would hold a
11 public hearing to examine ES&S's sale of uncertified AutoMARK machines to five California
12 counties, including San Francisco. The Secretary of State's investigation revealed that all 565
13 machines sold to San Francisco (as well as 407 AutoMARKs sold to other California counties) were
14 uncertified. The Secretary of State held the public hearing on October 15, 2007. The Secretary's
15 final statement of findings and decision was released on November 19, 2007, confirming the results
16 of its investigation.

17 18. Shortly after hearing of the Secretary of State's initial announcement, the Director of
18 Elections confirmed that the voting machines ES&S sold to San Francisco were not the certified
19 AutoMARK A100 machines. Instead, all of the machines were actually the uncertified AutoMARK
20 A200 machines.

21 19. Until the Secretary of State's announcement, San Francisco was unaware that ES&S
22 had manufactured a second version of the AutoMARK machines with modified hardware, software
23 and/or firmware that the Secretary of State had not certified, let alone that the AutoMARKs ES&S
24 had delivered to San Francisco were the uncertified A200s. Unless the machines are opened, the
25 A100 and A200 machines appear to be identical, but the City was unaware that there were two
26 different AutoMARK machines and had no reason to consider differences in appearance. ES&S
27 placed a sticker on the A200 machines it had delivered to San Francisco indicating that the
28 machines were federally certified when, in fact, the machines had not been federally certified at the

1 time of delivery. When the machines were shipped to San Francisco, ES&S included copies of
2 system installation and maintenance guides specifically for the certified model A100 machines, not
3 the A200 machines. The checklists used by ES&S employees to verify that the machines were in
4 good condition upon delivery indicated that the machine's firmware had been certified. In July
5 2006 and again in April 2007, when ES&S submitted a request for extension of certification to the
6 Secretary of State, it explicitly identified the certified AutoMARK machines as part of the voting
7 system for which it was seeking certification. The City relied on ES&S's repeated
8 misrepresentations that the company had sold certified voting machines to San Francisco.

9 20. Misled by ES&S's multiple false representations and statements, the City paid over
10 \$3.8 million for uncertified AutoMARK machines. Defendant ES&S presented San Francisco with
11 an invoice on May 31, 2006 for this amount, which the City paid in full. See Exhibit I.

12 21. At no time before the Secretary of State's announcement on August 21, 2007 or at
13 any time after did ES&S inform the City that it had sold San Francisco uncertified AutoMARKs.
14 Unaware that ES&S's representations were false that the machines sold and delivered to San
15 Francisco were certified, San Francisco unwittingly used what turned out to have been uncertified
16 AutoMARK ballot marking machines in both the June 2006 and November 2006 elections.

17 22. Finally informed that its 565 AutoMARK machines were uncertified, San Francisco
18 borrowed certified AutoMARK machines from neighboring Contra Costa County for its November
19 6, 2007 election to comply with state law requiring the use of certified voting machines in all
20 elections.

21 **II. ES&S'S FAILURE TO COMPLY WITH THE SECRETARY OF STATE'S**
22 **ADMINISTRATIVE RECERTIFICATION REQUIREMENTS**

23 23. As the truth regarding the uncertified AutoMARKs came to light, the Secretary of
24 State was considering the re-certification of the entire voting system ES&S had sold to San
25 Francisco.

26 24. The AutoMARK voting machine is one component of the voting system San
27 Francisco purchased from ES&S and uses in its elections. In addition to the AutoMARK, the ES&S
28 system employs several other components, including: (1) Optech Eagles ("Eagles"), optical

1 scanners used to tabulate ballots cast at individual precincts on Election Day; (2) Optech IV-Cs
2 ("IV-Cs"), high-speed optical scanners used to tabulate larger quantities of ballots such as those cast
3 by absentee voters; and (3) the UNITY Election Management System, a suite of data and program
4 management software. San Francisco has used the ES&S voting system for the traditional one-
5 candidate or measure, one-vote elections such as those used for state propositions, candidates for
6 state office, and candidates for federal office. San Francisco has also used the voting system for the
7 RCV elections run for certain public offices in the City including Mayor, Sheriff, District Attorney,
8 City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of
9 Supervisors.

10 25. For the last several elections, the Secretary of State has raised concerns about the
11 ability of the ES&S system to properly tabulate and record all votes and, as a result, has only
12 conditionally certified the ES&S voting system on an election-by-election basis. To ensure that
13 ES&S obtained the necessary certification for November 2007 election, the most recent amendment
14 to the Agreement required ES&S to "submit an application to the California Secretary of State no
15 later than May 1, 2007 for certification of the City's voting system, including RCV, in the
16 November 6, 2007 election." See Exhibit H ¶ 1(d). Instead of submitting an application for
17 certification by this deadline, on April 20, 2007, ES&S sent a one-page "Certification Extension
18 Request" asking that the Secretary of State administratively re-certify its RCV voting system
19 through December 31, 2008 -- even though the Secretary of State had explicitly stated in the
20 October 2006 re-certification that the certification was "on a one-time basis for use only in the
21 upcoming November 2006 General Election." See Exhibit J. On May 9, 2007, the Secretary of
22 State denied this request.

23 26. On June 25, 2007, ES&S belatedly re-applied for certification of its RCV voting
24 system. But the Secretary of State recently indicated that this application was incomplete. See
25 Exhibit K. On September 14, 2007, the Secretary of State notified ES&S and San Francisco that
26 she would administratively re-certify the existing RCV system for use in the November 6, 2007
27 election only. But the Secretary of State imposed significant restrictions on the use of the voting
28 system. The Secretary determined that these conditions were necessary because the "ES&S Optech

1 Eagle and related components have a number of problems in accurately tallying the votes that
2 simply cannot be overlooked." See Exhibit L. Among other conditions, the Secretary of State
3 imposed the following restrictions on the voting system for the November 6, 2007 election:

- 4 • The Eagles could not be used to tabulate votes independently. Only the central
5 tabulating machines, the IV-Cs, could be used to count ballots. The Eagle machines
6 were only allowed to determine whether an individual ballot contained overvotes
(*i.e.*, too many selections were made) or undervotes (*i.e.*, not enough selections were
7 made) and to store marked ballots at the polling place.
- 8 • Before inserting any ballots into the IV-C optical scan machines, San Francisco
9 Department of Elections staff were required to visually inspect each ballot. For any
10 ballots marked "incorrectly," including all those containing overvotes or undervotes,
11 the pollworkers were required to duplicate the entire ballot with the correct markings
12 prior to tabulation.
- 13 • San Francisco was required to conduct a manual tally of all the ballots cast in 10% of
14 the City's voting precincts.
- 15 • San Francisco was required to conduct a manual tally of 25% of all the absentee
16 ballots cast in the election.

17 The Secretary of State's conditional administrative recertification also expressly required ES&S to
18 reimburse San Francisco for all additional costs incurred by San Francisco to comply with these
19 conditions.

20 27. San Francisco incurred significant burdens and costs as a direct result of the
21 conditions imposed by the Secretary of State on the use of the ES&S voting system, including at
22 least the following:

- 23 • The Department of Elections could not release election results in a timely manner
24 because all of the ballots cast at each precinct could only be tabulated by the
25 centrally-located IV-C optical scan machines. Adding to the delay, Department of
26 Elections staff were required to "remake" thousands of ballots which contained
27 overvotes and undervotes prior to their tabulation. San Francisco normally
28 announces election results from the polling places by 11:00 p.m. on Election Day.
For the November 6, 2007 election, the City was delayed in providing the election
results from the polling places and has been unable to provide final election results
and does not expect to be able to release the final results until December 4, 2007
(four weeks after the election).
- Department of Elections staff were required to work thousands of overtime hours, at
considerable extra cost to the City, to manually review every ballot card; conduct the
additional manual tallies of all ballots; remake ballots that cannot be properly read by
the ES&S machines; resolve discrepancies between the manual tallies and machine
tallies; and, log, box, and move ballots to various locations in the City for
processing.

- City Hall has remained open long past normal business hours to allow for the observation of ballot processing, imposing direct costs on the City to heat and light the building, and to provide building security by requiring sheriff deputies and the building engineer to work overtime.

28. Section 59 of the Agreement, as amended in the Fifth Amendment, provides that ES&S must abide by all state laws and requirements, including all conditions imposed by the Secretary of State:

- "ES&S shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations, and all applicable laws as they may be amended from time to time." See Fifth Amendment, Exhibit F, ¶ 17(i) (amending Section 59.A of the Agreement).
- "Pursuant to this Agreement and by order of the Secretary of State, voting systems certified for use in California shall comply with all applicable state and federal statutes, regulations, *rules and requirements*, including, but not limited to, those voting system requirements set forth in *the California Elections Code*" Id. ¶ 17(i) (amending Section 59.B of the Agreement) (emphasis added).
- ". . . voting systems shall also comply *with all applicable state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of the California Elections Code*" Id. (emphasis added).

Section 19201(a) of the California Elections Code requires all voting systems to be certified by the Secretary of State before use in any elections, and Section 19205 provides the Secretary of State the authority to prescribe the specifications and regulations governing the use of voting machines in California. These sections authorize the Secretary of State to impose conditions on certification and to enforce those conditions.

29. Prior to signing the Fifth Amendment to the Agreement on April 10, 2006, ES&S was on notice that the Secretary may invoke her authority to impose additional conditions on certification. In March 2005, the Secretary of State conditionally approved the use of the ES&S voting system for use in San Francisco's RCV elections. This conditional approval stated: "The Secretary of State reserves the right . . . to impose additional requirements with respect to the use of the system if the Secretary determines that such modifications or additions are necessary to enhance the accuracy, reliability or security of the voting system. Such modifications or additions shall be deemed to be incorporated herein as if fully set forth." See Ex. M (¶ j., Mar 2005 certification).

1 Similar language was included in the Secretary of State's approval of ES&S's voting system for use
2 in the November 2006 election. See Ex. J (¶3.E, Oct 2006 certification).

3 30. ES&S breached the Agreement by refusing to comply with the condition imposed by
4 the Secretary of State that it pay for the additional costs incurred by San Francisco to meet the
5 Secretary of State's other certification conditions. On September 20, 2007, Director Arntz wrote to
6 request that ES&S fulfill its obligations under the Agreement, including its obligation to pay for the
7 additional costs of the conditional certification. Director Arntz requested that ES&S respond to
8 that letter by October 1, 2007.

9 31. ES&S failed to provide a formal written response to Director Arntz until October 18,
10 2007. In its letter, ES&S refused to comply with the Secretary of State's requirement that it pay for
11 all of the costs associated with the administrative recertification. With respect to the AutoMARKs,
12 ES&S agreed to pay for the transportation and some of the maintenance costs imposed by
13 borrowing the machines, but refused to pay for all potential maintenance and repair costs and all
14 costs required to convert the Contra Costa machines to provide a Cantonese language option for
15 voters, as required in San Francisco.

16 32. On November 7, 2007, pursuant to section 33 of the Agreement, San Francisco sent
17 ES&S a notice of default stating that the company had breached its Agreement with the City by: (1)
18 failing to provide certified AutoMARK voting machines; and (2) refusing to comply with the
19 Secretary of State's requirement, issued on September 14, 2007, that ES&S pay for all costs
20 associated with the administrative re-certification of the voting system. See Exhibit N. The notice
21 demanded that ES&S cure its breaches by: (1) paying for all costs associated with borrowing
22 certified AutoMARKs for the November 6, 2007 election; (2) permanently replacing San
23 Francisco's uncertified AutoMARKs with certified AutoMARKs in time for San Francisco's
24 upcoming 2008 elections; and (3) complying with the Secretary of State's requirement that the
25 company pay for all costs resulting from the administrative re-certification. Id. On November 19,
26 2007, Defendant ES&S refused to cure any of its breaches of contract.

FIRST CLAIM FOR RELIEF
Breach of Contract
(By San Francisco Against Defendant ES&S)

33. San Francisco restates and incorporates all of the above paragraphs as though fully set forth here.

34. Plaintiff San Francisco and Defendant ES&S are parties to the Agreement. See Exhibits A-G.

35. Except as otherwise excused by the conduct of Defendant ES&S, San Francisco has performed all conditions, covenants, and terms of the Agreement on its part to be performed. As alleged above, pursuant to Section 33 of the Agreement San Francisco sent ES&S a Notice of Default of the Agreement on November 7, 2007.

36. In selling and delivering uncertified AutoMARK machines to the City, Defendant ES&S has materially breached the following provisions of the Agreement:

- a. ES&S has breached Sections 59.A and 59.B of the Agreement, as amended by paragraph 17(i) of the Fifth Amendment, which require it "at all times [to] comply with . . . all applicable laws," including "all applicable state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of the California Elections Code or the Help America Vote Act of 2002 or other applicable state or federal law when appropriate, that are in effect as of the date of this Agreement" The California Elections Code requires that the California Secretary of State certify all voting machines in California prior to their use. Defendant ES&S breached Sections 59.A and 59.B by providing San Francisco with uncertified AutoMARK voting machines.
- b. In Section 20 of the Agreement, as amended by paragraph 17(f) of the Fifth Amendment, ES&S covenanted to provide San Francisco with "an accessible ballot-marking voting system," *i.e.*, the AutoMARK, that required "no additional federal or state certification." The AutoMARK Model A100 is the only version of the AutoMARK that has been certified by the California Secretary of State. Instead of the certified A100s, ES&S shipped uncertified AutoMARK A200 machines to San Francisco, thereby breaching Section 20 of the Agreement.
- c. In Section 59.B of the Agreement, ES&S "assume[d] full responsibility for any representation that the voting system sold and/or licensed hereunder complies with all applicable state . . . requirements as referenced above." In the same section, "[i]n the event such representation is determined to be false or misleading," ES&S further undertook responsibility "for the cost of any upgrade, retrofit or replacement, of the voting system or its component parts sold and/or licensed hereunder found to be necessary for certification or to otherwise be in compliance." Since ES&S misrepresented that the AutoMARKs it provided to San Francisco were certified under state law, under Section 59.B it was fully responsible for that misrepresentation,

1 including but not limited to all of the costs of borrowing certified
2 AutoMARKs from neighboring counties for the November 6, 2007 election
3 and permanently replacing the uncertified voting machines for future
4 elections. By refusing to pay all such costs and refusing to provide the City
5 with certified AutoMARK machines for use in future elections, ES&S has
6 breached Section 59.B of the Agreement.

7
8 37. In submitting a late application for certification of the ES&S voting system to the
9 Secretary of State and refusing to pay the costs associated with the Secretary of State's
10 administrative re-certification of the ES&S voting system, ES&S has materially breached the
11 following provisions of the Agreement:
12

- 13 a. In Section 20 of the Agreement, as amended by paragraph 1(d) of
14 the Seventh Amendment, ES&S agreed to "submit an application to
15 the California Secretary of State no later than May 1, 2007 for
16 certification of the City's voting system, including RCV, in the
17 November 6, 2007 election." ES&S breached this obligation by
18 failing to submit an application to the California Secretary of State
19 until June 25, 2007 and by submitting an application even at that late
20 date that was incomplete in that it failed to provide the Secretary of
21 State with all of the required materials and equipment.
- 22 b. On September 14, 2007, the California Secretary of State required
23 ES&S, as a condition for administrative certification of San
24 Francisco's voting system, to compensate San Francisco for all costs
25 associated with the conditions set forth in its administrative re-
26 certification. ES&S has refused to reimburse San Francisco for
27 these costs, thus violating a rule and requirement set by the
28 Secretary of State pursuant to the California Elections Code and
breaching Sections 59.A and 59.B of the Agreement.

38. As a direct and proximate result of the breaches by Defendant ES&S, San Francisco
has been damaged in an amount subject to proof at trial. The City has incurred substantial damages,
all resulting from Defendant's material breaches of the Agreement:

- a. Defendant's refusal to abide by the Secretary of State's requirement to pay for all
costs associated with the Secretary's administrative re-certification of the ES&S
voting system has forced San Francisco to bear burdens and costs of:
- i. Being unable to release election results in a timely manner because all of the
ballots cast at each precinct could only be tabulated by the centrally-located
IV-C optical scan machines;
- ii. Requiring Department of Elections staff to work thousands of overtime
hours, at considerable extra cost to the City, to manually review every ballot
card; to conduct the additional manual tallies of all ballots; to remake ballots
that cannot be properly read by the ES&S machines; to resolve discrepancies
between the manual tallies and machine tallies; and, to log, box, and move
ballots to various locations in the City for processing of the ballots; and

1 iii. Keeping City Hall open for extended hours to allow for observation of ballot
2 processing, including the costs to heat and light the building, pay sheriff
deputies to work overtime hours, and pay the building engineer to remain on
duty.

3 b. Defendant's failure to provide certified AutoMARKs pursuant to the Agreement has
4 resulted and will result in the following damages:

5 i. Paying un-reimbursed costs to borrow certified AutoMARKs from a
neighboring county and to convert them for use in San Francisco elections;

6 ii. Incurring the costs of negotiating with a new vendor, purchasing new
7 accessible voting machines that are fully compliant with federal, state and
local law, including certification requirements, for use in future elections.

8 San Francisco is entitled to other damages pursuant to law and according to proof at the time of trial
9 in this action.

10 **SECOND CLAIM FOR RELIEF**

11 **Fraud**

12 **(By San Francisco Against Defendant ES&S)**

13 39. San Francisco restates and incorporates all of the above paragraphs as though fully
set forth here.

14 40. Defendant ES&S made multiple representations that AutoMARK ballot-marking
15 machines that it sold to San Francisco were certified A100 machines:

16 a. Section 20 of the Agreement, as amended by paragraph 17(f) of the Fifth
17 Amendment, provided that the AutoMARK ballot-marking machines sold to
San Francisco would not require further state certification for use in the City's
18 elections. The Fifth Amendment was executed on April 10, 2006. Mr.
Thomas F. O'Brien, the Chief Financial Officer of ES&S, signed the Fifth
19 Amendment on behalf of the company. See Exhibit F.

20 b. When ES&S shipped the AutoMARK A200s to San Francisco in May 2006,
ES&S affixed stickers to each machine indicating that the machines had been
21 federally certified and included with the shipment operating manuals for the
certified A100s. The operating manuals, on the front cover, state that they
22 are intended for the "AutoMARK Voter Assist Terminal Model A100." See
Exhibit O.

23 c. Pursuant to section 16.A of the Agreement, as amended by the Fifth
24 Amendment, the parties were to complete acceptance testing "to confirm that
the Hardware performs in accordance with its documentation." See Exhibit
25 F. On March 15, 2006, Stephen Dennison, an account representative for
Defendant ES&S, e-mailed Crispin Tirso, an Elections Department
26 employee, an "ACCEPTANCE CRITERIA" checklist to be used for the
acceptance testing. One of the tasks on the checklist states "Check Firmware
27 Version 1.0 (Certified 6/24/2005)." See Exhibit P. Firmware Version 1.0 is
the firmware associated with the A100 machines.

1 41. All of ES&S's representations regarding the AutoMARKs were false because the
2 voting machines provided to the City were uncertified A200 machines instead of certified A100
3 machines.

4 42. On information and belief, at the time these representations were made, Defendant
5 ES&S had knowledge that the representations were false.

6 43. Further, on information and belief, after these false representations were made,
7 Defendant ES&S had exclusive knowledge that the representations were false and concealed the
8 fact that the AutoMARKs delivered to the City were the uncertified A200 machines. Further,
9 because ES&S had exclusive knowledge of material facts and actively concealed those facts from
10 the City, Defendant ES&S had a duty to disclose those material facts—the identity and certification
11 status of the AutoMARKs—to the City.

12 44. On information and belief, ES&S's false representations regarding the AutoMARKs
13 were made with the intent to deceive the City that it would receive certified A100 machines.

14 45. At the time these various false representations and false promises were made, San
15 Francisco was ignorant of their falsity and acted in justifiable reliance on Defendant's false
16 representations. San Francisco justifiably relied on those false representations because the two
17 different AutoMARK machines are visually identical, even though the A200 machine contains
18 modified hardware, software, and/or firmware.

19 46. As a result of Defendant's false representations and San Francisco's justifiable
20 reliance on those representations, San Francisco has been damaged and will further be damaged in
21 the following respects:

- 22 a. Executing the Fifth Amendment with Defendant and paying ES&S millions
23 of dollars for the AutoMARK machines that in fact, were not certified.
- 24 b. Using the uncertified AutoMARK voting machines in the City's June and
25 November 2006 elections.
- 26 c. Foregoing the opportunity to purchase certified voting machines from another
27 voting systems vendor.
- 28 d. Expending funds to borrow, use and return certified AutoMARKs from a
neighboring county and to convert them for use in San Francisco elections.

- 1 e. Possibly having to expend funds to borrow, use and return certified
2 AutoMARKs for future San Francisco elections and to convert them for use
3 in such elections.
4 f. Having to expend funds to purchase certified disabled accessible voting
5 machines and have those machines converted for use in future San Francisco
6 elections.
7 g. Loss of use of City resources devoted to addressing the lack of certification
8 of the AutoMARKs provided by ES&S and to rectifying that situation.

9 47. On information and belief, in doing the things alleged in this Complaint, Defendant
10 ES&S acted with malice and fraud so as to justify the award of punitive and exemplary damages.

11 **THIRD CLAIM FOR RELIEF**

12 **Negligent Misrepresentation**
13 **(By San Francisco Against Defendant ES&S)**

14 48. San Francisco restates and incorporates all of the above paragraphs as though fully
15 set forth herein.

16 49. Defendant ES&S made the false representations set forth in paragraph 40 above
17 without any reasonable ground for believing them to be true. Among other things, ES&S was
18 aware or should have been aware that (a) at all relevant times California law provided that "[n]o
19 voting system, in whole or in part, shall be used unless it has received the approval of the Secretary
20 of State prior to any election at which it is to be first used" (Cal. Elec. Code § 19201(a)); that the
21 California Elections Code prohibited modifications of voting equipment and machines, without
22 prior approval and authorization by the Secretary of State (see Cal. Elec. Code §§ 18564.5, 19213);
23 and that on August 3, 2005, the California Secretary of State issued a conditional certification of the
24 ES&S voting system, including the AutoMARK A100, stating that "[n]o substitution or
25 modification of the voting systems shall be made with respect to any component of the voting
26 systems, including the Procedures, until the Secretary of State has been notified in writing and has
27 determined that the proposed modification does not impair the accuracy and efficiency of the voting
28 systems sufficient to require a re-examination and approval." (See Exhibit Q.) ES&S knew that the
machines it provided to San Francisco were not the certified AutoMARK A100 machines but were
instead AutoMARK A200 machines that it had never submitted to the Secretary of State for
approval.

1 50. On information and belief, Defendant ES&S's false representations regarding the
2 AutoMARKs were made with the intent to induce San Francisco to rely upon them.

3 51. At the time these various false representations and false promises were made, San
4 Francisco was ignorant of their falsity and acted in justifiable reliance on Defendant's false
5 representations. San Francisco justifiably relied on those false representations because ES&S had
6 represented it was providing certified AutoMARK machines, the two different AutoMARK
7 machines are visually identical from the outside, even though the A200 machine contains modified
8 hardware, software, and/or firmware, the documentation (including manuals) provided by ES&S
9 were for the certified A100 machines, and ES&S never informed San Francisco that the
10 AutoMARK machines it was providing were not the certified A100 machines.

11 52. As a result of ES&S's false representations and San Francisco's justifiable reliance on
12 those representations, San Francisco has been damaged in the following respects:

- 13 a. Executing the Fifth Amendment with Defendant and paying ES&S millions
14 of dollars for the AutoMARK machines that in fact were not certified.
- 15 b. Using the uncertified AutoMARK voting machines in the City's June and
16 November 2006 elections.
- 17 c. Foregoing the opportunity to purchase certified voting machines from another
18 voting systems vendor.
- 19 d. Expending funds to borrow, use and return certified AutoMARKs from a
20 neighboring county and to convert them for use in San Francisco elections.
- 21 e. Possibly having to expend funds to borrow, use and return certified
22 AutoMARKs for future San Francisco elections and to convert them for use
23 in such elections.
- 24 f. Having to expend funds to purchase certified disabled accessible voting
25 machines and have those machines converted for use in future San Francisco
26 elections.
- 27 g. Loss of use of City resources devoted to addressing the lack of certification
28 of the AutoMARKs provided by ES&S and to rectifying that situation.

FOURTH CLAIM FOR RELIEF

**Violations of California Elections Code
(California Elections Code § 18564.5)
(By Arntz Against Defendant ES&S)**

53. Plaintiff John Arntz, Director of the Department of Elections for San Francisco,
restates and incorporates all of the above paragraphs as though fully set forth here.

1 54. Section 18564.5(a)(5) of the California Elections Code provides that any local
2 elections official may bring a civil action against a business or legal entity that, before, during, or
3 after an election, "[k]nowingly, and without authorization, inserts or causes the insertion of
4 uncertified hardware, software, or firmware, for whatever purpose, into any voting machine, voting
5 device, voting system, vote tabulating device, or ballot tally software."

6 55. Defendant ES&S violated section 18564.5(a)(5) by committing the following acts:

- 7 a. Knowingly inserting uncertified hardware, software and/or firmware into a
8 voting machine or device, the AutoMARK A100, without the authorization
9 of either the California Secretary of State or the Department of Elections for
10 San Francisco; and
- 11 b. Knowingly inserting the AutoMARK A200, an uncertified voting machine
12 into the voting system used in San Francisco elections without the
13 authorization of either the California Secretary of State or the Department of
14 Elections for San Francisco.

15 56. Section 18564.5(a)(6) of the California Elections Code provides that any local
16 elections official may bring a civil action against a business or legal entity that, before, during, or
17 after an election, "[f]ails to notify the Secretary of State prior to any change in hardware, software,
18 or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified
19 or conditionally certified for use in this state."

20 57. Defendant ES&S has violated section 18564.5(a)(6) by failing to notify the Secretary
21 of State prior to changes in the hardware, software and/or firmware to the AutoMARK A100. The
22 Secretary of State conditionally certified the AutoMARK A100 for use in the City's June and
23 November 2006 elections.

24 58. Defendant ES&S committed the aforementioned acts before the City's June and
25 November 2006 elections.

26 59. Section 18564.5(b) of the California Elections Code provides that in any civil action
27 brought pursuant to either section 18564.5(a)(5) or 18564.5(a)(6), the violator will be subject to a
28 civil penalty of \$50,000 per violation and appropriate injunctive relief. Due to its shipment of 565
uncertified AutoMARKs to San Francisco that were used in two separate elections, ES&S has
committed at least 1,130 violations of this statute.

FIFTH CLAIM FOR RELIEF

**Violations of California False Claims Act
(California Government Code § 12650, et seq.)
(By San Francisco Against Defendant ES&S)**

60. San Francisco restates and incorporates all of the above paragraphs as though fully set forth herein.

61. Under the California False Claims Act, any person, corporation or business is liable to the affected political subdivision for three times the amount of damages which the political subdivision sustains, plus the costs of a civil action brought to recover such penalties or damages, and a civil penalty for each of the following acts committed by that person, corporation or business:

- a. Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval;
- b. Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision;
- c. Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used;

62. Defendant ES&S violated the California False Claims Act by committing the following acts:

- a. Knowingly presenting to Suzanne Berg, former Deputy Director for the Department of Elections, a false claim for payment on May 31, 2006. See Exhibit I. The claim for payment was false because the underlying purchase agreement, the Fifth Amendment, promised the delivery of certified AutoMARK A100 machines whereas uncertified AutoMARK A200s were actually provided. Further, the claim stated that payment would be due upon acceptance of the AutoMARKs and receipt of Prop 41 and HAVA funds. One of the criteria for the City's acceptance of AutoMARKs was that the AutoMARK machines contained certified Firmware Version 1.0, the firmware associated with certified A100 machines. And the claim's reference to California Proposition 41 and HAVA funds as a condition of payment further falsely suggested that the machines provided would be AutoMARK A100s because in order to qualify for HAVA and Proposition 41 funds, the voting machines must be certified.
- b. Knowingly making a series of false statements in Section 20 of the Agreement, as amended by paragraph 17(f) of the Fifth Amendment, providing that the AutoMARK ballot-marking machines sold to San Francisco would not require further state certification for use in the City's elections. See Exhibit F. On information and belief, Defendant ES&S

1 knowingly made those statements to get a false claim, the May 31, 2006
2 invoice, approved by San Francisco.

3 c. Section 16.A of the Agreement, authorized the delivery and completion of
4 documentation attesting that the property to be used was acceptable. See
5 Exhibit F. Concurrent with the delivery of the AutoMARK machines, ES&S
6 employees completed "ACCEPTANCE CRITERIA" checklists certifying the
7 property to be used by San Francisco. ES&S personnel filled out a checklist
8 for each machine and delivered those checklists to Elections Department staff
9 in early May 2006. Each checklist states that every machine contained
10 "Firmware Version 1.0." See Exhibit R. The AutoMARK machines sent to
11 San Francisco did not, in fact, contain the certified Firmware Version 1.0
12 provided with A100 machines, thus falsely representing the property to be
13 used by the City in its elections.

14 63. The False Claims Act provides that any person who knowingly submits or causes to
15 be submitted a false or fraudulent claim to the government for payment or approval is liable for a
16 civil penalty of up to \$10,000 for each such claim submitted or paid, plus three times the amount of
17 damages sustained by the government.

18 64. As a direct and proximate result of Defendant's false claims and statements, San
19 Francisco has been damaged in the amount of \$3,792,105.22, the price of the AutoMARK voting
20 machines purchased by San Francisco, plus all un-reimbursed costs to borrow certified
21 AutoMARKs from a neighboring county and to convert them for use in San Francisco elections.
22 Whereas the full extent of such damages and penalties have not yet been ascertained, San Francisco
23 reserves its right to later amend this Complaint, to allege further false claims as discovery allows the
24 investigation of such claims, to affix those damages when they are determined with greater certainty
25 and to assess such penalties and treble damages allowable under the Act.

26 **SIXTH CLAIM FOR RELIEF**

27 **Unfair Competition** 28 **(California Business & Professions Code § 17200, et seq.)** **(By the People Against Defendant ES&S)**

65. Plaintiff People of the State of California, acting by and through San Francisco City
Attorney Dennis J. Herrera, restate and incorporate all of the above paragraphs as though fully set
forth here.

66. Section 17200 of the California Business and Professions Code provides that unfair
competition shall mean and include any "unlawful, unfair, or fraudulent business act or practice and
unfair, deceptive, untrue or misleading advertising."

2. Exemplary or punitive damages in an amount sufficient to punish and deter;
3. Costs of suit incurred, including costs of investigation and court costs;
4. Interest on sums due; and
5. Such other and further relief as the Court deems just and proper.

Third Claim for Relief (Negligent Misrepresentation):

1. General, consequential, and compensatory damages according to proof;
2. Costs of suit incurred, including costs of investigation and court costs;
3. Interest on sums due; and
4. Such other and further relief as the Court deems just and proper.

Fourth Claim for Relief (Violations of California Elections Code):

1. Pursuant to Elections Code Section 18564.5(b), assessment of a civil penalty not to exceed fifty thousand dollars (\$50,000) for each violation of section 18564.5(a), based on the number of violations and penalty amount per violation to be ascertained in accordance with the evidence. These penalties shall be cumulative to any other penalties or other remedy;
2. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order enjoining Defendant ES&S from performing or proposing to commit any of the aforementioned violations of the California Elections Code within California;
3. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order that the Department of Elections for San Francisco recover its costs, including costs of investigation and suit incurred by San Francisco and its departments, including the City Attorney's Office;
4. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order that Defendant remove and/or replace any uncertified hardware, software, or firmware that it inserted or caused to insert, for whatever purpose, into any voting machine, voting device, voting system, vote tabulating device, or ballot tally software, without authorization from either the California Secretary of State or the Department of Elections for San Francisco;
5. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order that Defendant remove and/or replace any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state, for which it did not provide prior notification to the California Secretary of State;
6. Such other and further relief as this Court may deem just and proper.

Fifth Claim for Relief (Violations of California False Claims Act):

1. General, consequential, and compensatory damages according to proof;

2. Damages in an amount equal to three times the amount of actual damages suffered by San Francisco;
3. Penalties in an amount equal to \$10,000 for each false claim, as ascertained in accordance with the evidence;
4. Costs of suit incurred, including costs of investigation and court costs;
5. Interest on sums due; and
6. Such other and further relief as the Court may deem proper.

Sixth Claim for Relief (Unfair Competition):

1. Pursuant to Business & Professions Code Section 17206, assessment of a civil penalty not to exceed two thousand, five hundred dollars (\$2,500) for each violation of section 17200, based on the number of violations and penalty amount per violation to be ascertained in accordance with the evidence. These penalties shall be cumulative to any other penalties or other remedy;
2. Pursuant to Business & Professions Code section 17203 and 17204, an order enjoining Defendant ES&S from performing or proposing to perform any of the aforementioned acts of unfair competition within California;
3. Pursuant to Business & Professions Code section 17203, an order requiring Defendant ES&S to restore to San Francisco and the other victims of its practices the amounts obtained through the aforementioned acts of unfair competition, cumulative to any other remedy;
4. Imposition of a constructive trust upon any and all funds in Defendant's possession obtained through acts of unfair competition;
5. Costs of suit;
6. Such other and further relief as this Court deems just and proper in order to fully and successfully dissipate the effects of the unfair, fraudulent and unlawful acts, practices and patterns of conduct complained of herein.

Dated: November 20, 2007

DENNIS J. HERRERA
City Attorney
THERESE STEWART,
Chief Deputy City Attorney
JAMES M. EMERY
ANDREW SHEN
ANN M. O'LEARY
Deputy City Attorneys

By: _____
JAMES M. EMERY

Attorneys for Plaintiffs
CITY AND COUNTY OF SAN FRANCISCO, et al.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial in the above-entitled action.

Dated: November 20, 2007

DENNIS J. HERRERA
City Attorney
THERESE STEWART,
Chief Deputy City Attorney
JAMES M. EMERY
ANDREW SHEN
ANN M. O'LEARY
Deputy City Attorneys

By: _____
JAMES M. EMERY

Attorneys for Plaintiffs
CITY AND COUNTY OF SAN FRANCISCO, et al.