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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 -San Francisco-

13 HENRY G. MCKENZIE,

14 Plaintiffs,

15 vs.

16 CITY AND COUNTY OF SAN
17 FRANCISCO; GEORGE GASCON;
18 JERRY RODRIGUEZ; DAVID CREW;
19 and DOES 1-10.

20 Defendants.

21 Case No.: 4:18-cv-07141-DMR

22 **FIRST AMENDED COMPLAINT**
23 **FOR DAMAGES**

- 24 1. California Labor Code § 1102.5 and
- 25 6310 violations against all Defendants;
- 26 2. 42 U.S.C. § 1983 against all Defendants
- 27 (First Amendment Violation);
- 28 3. FEHA Violations/Title VII Violations –
- Age discrimination against CCSF;
- 4. FEHA – Failure to Take Reasonable
- Steps against CCSF;
- 5. Intentional Infliction of Emotional
- Distress; and
- 6. 42 U.S.C. § 1983 (Fourteenth
- Amendment Violation).

29 **DEMAND FOR JURY TRIAL**

30 Amount in controversy exceed \$75,000

1 COMES NOW, Plaintiff HENRY G. MCKENZIE and hereby alleges and avers the
2 following based upon personal knowledge as to facts known to him and upon information and
3 belief as to all other matters against Defendants CITY AND COUNTY of SAN FRANCISCO;
4 GEORGE GASCON; JERRY RODRIGUEZ; DAVID CREW and DOES 1-10 as follows:

5 **I. INTRODUCTION**

6 1. This is a case of utmost public concern. On or about 2017, several executive
7 members of the San Francisco District Attorney’s Office Investigators Association (the
8 “Union”) discussed the need to blow the whistle on potential criminal violations by the Office
9 of the District Attorney. Specifically, the Union’s executive members, including Plaintiff
10 HENRY G. MCKENZIE, a Senior Investigator in the Office of the District Attorney and
11 member-at-large for the association, discussed allegations that Defendant GEORGE GASCON,
12 the District Attorney, had traveled on many occasions by plane while carrying a firearm in
13 violation of federal law. The executive members of the Union discussed the need to raise their
14 concerns regarding Defendant GASCON with the Transportation Security Administration (the
15 “TSA”) and the Department of Homeland Security on multiple occasions.

16 2. At or around the time of those meetings and after an investigator at the Office of
17 the District Attorney contacted the TSA regarding Defendant GEORGE GASCON, Defendants
18 engaged in pattern of retaliation and harassment meant to punish personnel who had discussed
19 and/or raised allegations of impropriety by the District Attorney. Plaintiff, an investigator in
20 good standing, was terminated by Defendants in retaliation for his participation in the Union
21 and Defendants’ belief that Plaintiff had either been a whistleblower or had aided a
22 whistleblower. Not content only to terminate Plaintiff, Defendants went further, sullyng
23 Plaintiff’s reputation by accusing him of having *Brady* issues in an effort to destroy his career
24 – a move that not only impacted Plaintiff personally and financially, but that also put San
25 Franciscans at risk given Plaintiff’s ability to testify in criminal cases was jeopardized, which
26 could result in violent suspected criminals to avoid prosecution.

27 3. In fact, since the filing of this Complaint, the Office of the District Attorney has
28 gone further in retaliating against Plaintiff to the detriment of residents of the City of San
Francisco, informing Plaintiff that he has potential *Brady* issues arising from the federal
Complaint filed by Plaintiff’s attorneys against the District Attorney. See the Office of the
District Attorney’s *Brady* Notice dated January 8, 2019 attached hereto as **Exhibit 1**. Said

1 action by the Office of the District Attorney is obviously retaliatory, not in conformity with
2 any case law or statute, and clearly meant to punish Plaintiff for bringing forth this Complaint.
3 Additionally, and more troubling still, because of said action by the Office of the District
4 Attorney, Plaintiff may not be called to testify in a criminal trial and/or his testimony may be
5 undermined, which could damage efforts to bring to justice persons involved in a double
6 homicide, imperiling the safety of the community. Upon information and belief, these actions
7 against Plaintiff are being undertaken at the behest and pursuant to the instructions of the San
8 Francisco District Attorney – a named defendant in this action.

9 **II. JURISDICTION**

10 4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and
11 1343(3) as the controversy arises under “the constitution, laws or treaties of the United States.”

12 5. This Court has supplemental jurisdiction over Plaintiff’s California state law
13 claims pursuant to 28 U.S.C. § 1367.

14 **III. VENUE**

15 6. Venue is proper in the Northern District of California pursuant to 28 U.S.C §
16 1391(b) because the acts, events or omissions giving rise to this action occurred in this District.
17 This action is also brought pursuant to 42 U.S.C. §§ 1981, 1983 and 1988, Title VII of the Civil
18 Rights Act of 1964, and the First Amendment to the United States Constitution, made applicable
19 to Defendants through the Fourteenth Amendment to the United States Constitution. This Court
20 has jurisdiction over Plaintiff’s claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a). This
21 Court has further jurisdiction over Plaintiff’s state law claims under 28 U.S.C. § 1367 as those
22 claims form part of the same case and controversy under Article III of the United States
23 Constitution.

24 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the events
25 giving rise to this action occurred in the City and County of San Francisco, which is located in
26 this district.

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IV. PARTIES

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2 8. At all times material to this Complaint, Plaintiff HENRY G. MCKENZIE
3 (“MCKENZIE”) was and is a resident of the County of Sonoma in the State of California.
4 Between 2010 through October 2017, Plaintiff MCKENZIE was an investigator and then
5 senior investigator in the Office of the District Attorney for the CITY AND COUNTY OF
6 SAN FRANCISCO.

7 9. Plaintiff is informed and believes that Defendant CITY AND COUNTY OF
8 SAN FRANCISCO is a public entity (“CCSF”).

9 10. Defendant GEORGE GASCON is an individual employed by Defendant CITY
10 AND COUNTY OF SAN FRANCISCO. Plaintiff is informed and believes that Defendant
11 GASCON is a resident of the City and County of San Francisco in the State of California. At
12 all times relevant to this Complaint, GASCON was the District Attorney for the CITY AND
13 COUNTY OF SAN FRANCISCO and Plaintiff’s supervisor with the authority to alter the
14 Plaintiffs’ employment status and working conditions.

15 11. Defendant JERRY RODRIGUEZ is an individual employed by Defendant
16 CITY AND COUNTY OF SAN FRANCISCO. Plaintiff is informed and believes that
17 Defendant RODRIGUEZ is a resident of the State of California. At all times relevant to this
18 Complaint, RODRIGUEZ was the Chief of Investigations for the CITY AND COUNTY OF
19 SAN FRANCISCO and Plaintiff’s supervisor with the authority to alter the Plaintiffs’
20 employment status and working conditions.

21 12. Defendant DAVID CREW is an individual employed by Defendant CITY
22 AND COUNTY OF SAN FRANCISCO. Plaintiff is informed and believes that Defendant
23 CREW is a resident of the State of California. At all times relevant to this Complaint, CREW
24 was the Captain of Investigations for the CITY AND COUNTY OF SAN FRANCISCO and
25 Plaintiff’s supervisor with the authority to alter the Plaintiffs’ employment status and working
26 conditions.

27 13. Plaintiff is ignorant of the true names and capacities of the Defendants sued
28 herein as DOES 1 to 10, inclusive, and therefore sues those Defendants by such fictitious

1 names. Plaintiff will amend the Complaint to allege their true names and capacities when
2 ascertained.

3 14. Plaintiff is informed and believes, and thereon alleges, that Defendants and each
4 of them are responsible under the law in some manner for the unlawful actions and unlawful
5 practices complained of herein.

6 15. Plaintiff is informed and believes, and thereon alleges, that at all times material
7 hereto and mentioned herein, each Defendant sued (both named and DOE Defendants) was the
8 successor in interest, predecessor in interest, agent, servant, employer, joint-employer, joint
9 venture, contractor, contractee, partner, division owner, co-owner, subsidiary, division, alias,
10 and/or alter ego of each of the remaining defendants and was, at all times, acting within the
11 purpose and scope of such agency, servitude, employment, contract, ownership, subsidiary,
12 alias and/or alter ego and with the authority consent, approval, control, influence and
13 ratification of each remaining Defendants sued herein.

14 16. Plaintiff is informed and believes, and thereon allege, that each and all of the
15 acts and omissions alleged herein were performed by, and/or are attributed to, all Defendants,
16 each acting as agents, employees, and/or co-conspirators, and/or under the direction and
17 control, of each of the other Defendants; and that said acts and failures to act were within the
18 course and scope of said agency, employment, conspiracy and/or direction and control.

19 17. Defendants, and each of them, were at all times an “employer” within the
20 meaning of Title VII (42 U.S.C. § 2000e(b)) and the Fair Employment and Housing Act (Cal.
21 Gov. §12926(d).) Therefore, Defendants were prohibited from engaging in acts of
22 discrimination, harassment and/or retaliation against employees based on age and sexual
23 orientation. Defendants are further required to take all reasonable steps necessary to prevent
24 discrimination and harassment from occurring, including taking immediate and appropriate
25 corrective action in response to unlawful conduct.

26 18. Defendants, and each of them, were acting under color of law at all times as it
27 pertains to the matters contained in this Complaint.
28

1 19. The unlawful employment practices complained of herein occurred within the
2 County of San Francisco, State of California.

3
4 **V. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

5 20. On October 30, 2017 Defendants terminated Plaintiff MCKENZIE.

6 21. Plaintiff MCKENZIE timely requested an administrative review of his
7 termination by the Office of the District Attorney pursuant to the Public Safety Officers
8 Procedural Bill of Rights Act (the “POBRA”) and, on December 6, 2017, Plaintiff filed a pre-
9 hearing brief stating, among other things, that he had been terminated in violation of “[p]ublic
10 policy” as a result of exercising his “First Amendment rights and for providing information
11 that is protected by the Common Interest Privilege (as well as Cal. Civ. Code § 47(c)), and in
12 violation of Labor Code § 1102.5(b).”

13 22. On or about February 19, 2018, following an administrative review of the
14 District Attorney’s decision by the Office of the District Attorney itself, Plaintiff’s termination
15 was upheld.

16 23. Thereafter, on or about April 20, 2018, Plaintiff timely filed a Government Tort
17 Claim alleging violation of public policy, violation of Title VII of the Civil Rights Act, the Fair
18 Employment and Housing Act, and several other state causes of action against the Defendants.

19 24. On or about May 25, 2018, Defendant CITY AND COUNTY OF SAN
20 FRANCISCO denied Plaintiff’s Government Tort Claim.

21 25. Thereafter, Plaintiff filed a claim of discrimination with California Fair
22 Employment and Housing Commission (Case No. 201808-03217813) on or about August 13,
23 2018 and received a right to sue notice on the same date. Plaintiff cross-filed the claim with
24 the Equal Employment Opportunity Commission (“EEOC”) and requested a right to sue on
25 August 24, 2018 (EEOC Charge No. 550201801763). The EEOC referred the matter to the
26 Department of Justice (the “DOJ”). The DOJ issued a right to sue notice on or about November
27 19, 2018.

1 26. Plaintiff is informed and believes that, to the extent that administrative
2 exhaustion is necessary, he has satisfied all private, administrative and judicial prerequisites to
3 the institution of this action.

4 27. This action is not preempted by the California Workers' Compensation Act
5 because civil rights violations, Whistleblower-statute violations, and discrimination,
6 harassment, failure to investigate and retaliation are not risks or conditions of employment
7 under the California Workers' Compensation Act.

8
9 **VI. CONTINUING VIOLATIONS/EQUITABLE TOLLING**

10 28. The wrongful acts and omissions giving rise to the Defendants' liability in this
11 action commenced in or about summer/spring 2017 and are "continuing" in nature to the
12 present time. At all times, Plaintiff endeavored to resolve his disputes through an internal
13 grievance/administrative review process directly with Defendant CITY AND COUNTY OF
14 SAN FRANCISCO. Accordingly, Plaintiff asserts the doctrine of "equitable tolling" on all his
15 claims during the period that he was endeavoring to resolve his disputes internally.

16
17 **SUBSTANTIAL MOTIVATING REASONS**

18 29. The unlawful actions alleged directed against the Defendants as alleged here
19 herein were substantial factors motivating the adverse employment decisions directed against
20 Plaintiff MCKENZIE up to and including his termination.

21
22 **VII. FACTUAL DISCUSSION**

23 **A. THE WHISTLE BLOWING**

24 30. Defendant CITY AND COUNTY OF SAN FRANCISCO hired Plaintiff
25 MCKENZIE as an Investigator for the Office of the District Attorney's Bureau of Investigation
26 in 2010. At the time, current United States Senator Kamala Harris was San Francisco's District
27 Attorney.

1 31. On or about 2011, the Mayor of the City and County of San Francisco appointed
2 Defendant GASCON to fill the District Attorney position following Senator Harris’s election
3 to Attorney General for the State of California.

4 32. In his capacity as investigator, Plaintiff MCKENZIE performed investigative
5 work in the most difficult and complex criminal investigations under the jurisdiction of the
6 District Attorney’s Office – the vast majority of which dealt with homicides and violent
7 crimes.

8 33. Within a short time frame, on or about 2012, Plaintiff MCKENZIE was
9 promoted to Senior District Attorney Investigator. In that capacity, Plaintiff MCKENZIE
10 continued to perform investigative work and was tasked with supervisory responsibilities,
11 including, but not limited to, becoming a working supervisor in difficult field investigations;
12 assisting in training lower level investigators and other members of the District Attorney’s
13 staff; and directing subordinate investigators in the field.

14 34. Because Plaintiff MCKENZIE was a first-level supervisor within the Office of
15 the District Attorney, between 2011 and 2017, Defendant CITY AND COUNTY OF SAN
16 FRANCISCO sent Plaintiff MCKENZIE to receive further supervisory training at (i) the POST
17 Supervisorial School in California, and (ii) the Sherman Block Supervisory Leadership
18 Institute (SBSLI) – a nine-month long training class for “first-level supervisory peace
19 officer[s].” Plaintiff MCKENZIE completed both supervisory trainings.

20 35. Between 2010 and 2017, Plaintiff MCKENZIE received numerous honors from
21 Defendant CITY AND COUNTY OF SAN FRANCISCO. During that time, Plaintiff
22 MCKENZIE worked on hundreds of cases and helped incarcerate dozens – if not hundreds – of
23 criminals, making the streets of San Francisco safer for its residents and visitors.

24 36. Plaintiff MCKENZIE developed a strong reputation within the Office of the
25 District Attorney of being a hard working, committed, and excellent senior district attorney
26 investigator. Most precious to Plaintiff McKenzie, personally and professionally, was his
27 reputation for honesty and integrity.

1 37. On or around 2014, Plaintiff was elected by fellow Union members to be a
2 member-at-large for the San Francisco District Attorney’s Office Investigators Association –
3 the union equivalent for District Attorney investigators. The Union, which would work with
4 the San Francisco Police Officers Association (the “SF POA”) on occasion, had a seven-
5 member governing body, comprised of a Union president, vice president, treasurer, secretary,
6 and three members-at-large. The Union’s governing body would meet during non-work hours
7 to discuss Union business including lobbying efforts (e.g., to try to obtain civil service
8 protection for investigators), working conditions for investigators, and any concerns regarding
9 the Office of the District Attorney.

10 38. Starting in late 2016/early 2017, the Union’s governing body discussed
11 allegations that the District Attorney, Defendant GASCON, was committing felonies when
12 traveling while armed in violation of federal law on several occasions. The Union’s governing
13 body, including Plaintiff, discussed their legal obligation to report these potential crimes to the
14 United State of America Transportation Security Administration (the “TSA”) and/or the
15 Department of Homeland Security and/or other federal law enforcement agencies.

16 39. Upon information and belief, by 2017 Defendants were aware that the Union’s
17 governing body, including Plaintiff, was discussing potential illegal conduct by Defendant
18 GASCON and the other Defendants and was considering reporting Defendants’ perceived
19 unlawful conduct (especially by Defendant GASCON) to outside government agencies (i.e.,
20 “blowing the whistle on behavior they believed to be criminal”.)

21 40. Around the same time in spring 2017, and upon information and belief, an
22 investigator at the District Attorney’s Office contacted federal authorities to blow the whistle
23 on Defendant GASCON. Upon information and belief, the investigator informed the TSA that
24 Defendant GASCON had been unlawfully traveling by plane while armed with a firearm on
25 many instances – a violation of federal law, which requires peace officers traveling while
26 armed to state they are doing so for a lawful and specific reason under penalty of perjury. Upon
27 information and belief, Defendant GASCON, while serving as District Attorney, was neither
28 an active peace officer nor had any need to travel while armed.

1 41. Upon information and belief, federal authorities have launched a criminal
2 investigation into Defendant GASCON regarding the investigator's allegations of unlawful
3 travel practices, which investigation is still ongoing as of the writing of this Complaint.

4 42. Upon information and belief, weeks after the investigator blew the whistle on
5 Defendant GASCON with the TSA, an unknown person also began to circulate anonymous
6 letters within the Office of the District Attorney that, among many other things, stated that
7 Defendant GASCON had violated federal law when flying armed.

8 43. Upon information and belief, Defendants know the identity of the investigator
9 that contacted the TSA regarding Defendant GASCON. Plaintiff will refer to that investigator
10 as Investigator Doe.

11 44. Upon information and belief, Defendants were aware that the Union's
12 governing body, including Plaintiff, had also met to discuss the need to blow the whistle on
13 Defendant GASCON and would likely blow the whistle on Defendant GASCON.

14 45. Upon information and belief, Defendants believe that Plaintiff was the author of
15 the anonymous whistleblower letters that appeared following Investigator Doe's report to the
16 TSA.

17
18 **B. DEFENDANT GASCON'S AGENTS AND THE ESCALATION OF A DISCRIMINATORY AND**
19 **HOSTILE WORK ENVIRONMENT**

20 46. Around the same time that Defendant GASCON's alleged unlawful travel with
21 a concealed weapon was being considered by the Union in late 2016, Defendant GASCON, a
22 former officer and director at the Los Angeles Police Department, hired a close friend and
23 former Los Angeles Police Department captain, Defendant JERRY RODRIGUEZ, to become
24 a lieutenant at the Office of the District Attorney's Bureau of Investigations where Plaintiff
25 worked.

26 47. Plaintiff MCKENZIE recalls that one of the first things that Defendant
27 RODRIGUEZ told him upon meeting him was, in connection with RODRIGUEZ's
28

1 relationship to GASCON, “I would do anything for that man.” At the time, in late 2016,
2 Plaintiff MCKENZIE considered that comment to be very odd.

3 48. Within a short time of being brought into the Office of the District Attorney, on
4 or about March 2017, Defendant GASCON promoted Defendant RODRIGUEZ to become the
5 Chief of the Bureau of Investigations.

6 49. At or about the same time, Defendant GASCON promoted Defendant DAVID
7 CREW to Captain of the Bureau of Investigations. Defendant CREW was known also to be
8 very loyal to Defendant GASCON and RODRIGUEZ.

9 50. Shortly after the promotions of Defendants RODRIGUEZ and CREW, it
10 became apparent that Defendant GASCON was “cleaning house” at the Office of the District
11 Attorney. Normally, that would be considered a good thing if it was to clear bad actions. But in
12 this case, it was apparent that Defendant GASCON was using the shield of “good intent” for
13 his own political purposes; to cull out those who did not show allegiance to Defendant
14 GASCON and who were not willing to cover up his misdeeds and/or apparent illegal actions.

15 51. Over the course of the next several months, nearly half to the investigative
16 department was wiped out; approximately 14 staff members were either terminated or forced to
17 resign under intense pressure within a short-time span. All the separated employees were either
18 over 40 years old and/or were members of the Union – many of whom knew of the allegations
19 concerning Defendant GASCON’s violations of federal law.

20 52. Typically, the separated employees were either reprimanded or pressured by
21 Defendants RODRIGUEZ and CREW at the behest of Defendant GASCON. For example, of
22 the Union’s seven-member governing body, four of the executive members were either
23 terminated or reprimanded in some way in the following months, with the District Attorney, by
24 and through Defendant RODRIGUEZ, brining an Internal Affairs investigation against the
25 Union president, for instance.

26 53. Over the course of the next several months, after Investigator Doe reported
27 Defendant GASCON to the TSA and that other staff-persons were believed to either be leaking
28

1 said information to the press and/or federal authorities, a cloud descended on many of the
2 upper managers at the Office of the District Attorney.

3 54. On September 5, 2017, Defendant GASCON engaged in the most chilling and
4 egregious act of bullying and intimidation. While addressing the entire staff for the District
5 Attorney’s Bureau of Investigations department at a training day at the shooting range at Lake
6 Merced, Defendant GASCON threatened the staff that he perceived there was “cancer”
7 growing in the Bureau of Investigations and he was going to cut it out. In his tirade, Defendant
8 GASCON compared this “cancer” to incidences of corruption he was aware of while serving
9 Los Angeles Police Department, including an alleged police officer murder-for-hire scheme.
10 Defendant GASCON threatened three times that if anyone was going to talk to Matier & Ross
11 (newspaper journalists), “they better make sure they had their facts straight” and that he
12 (defendant Gascon) would “be around a lot longer than anyone else” at the Bureau.

13 55. Plaintiff MCKENZIE understood the references made by Defendant GASCON
14 on September 5, 2017 meeting referred to the anonymous whistleblowing letters that had been
15 circulating the department given that the whistleblowing letters referenced two San Francisco
16 Chronicle reporters – Phil Matier and Andy Ross.

17 56. Upon information and belief, Defendant GASCON believed Plaintiff to be the
18 author of those whistleblower letters.

19 57. The very next day, on September 6, 2017, Plaintiff was called into Defendant
20 CREW’s office. Plaintiff was informed that he was being placed on administrative leave and
21 that an Internal Affairs investigation was pending. Given the timing of this action and the
22 comments made by Defendant GASCON, this action defamed Plaintiff professionally before
23 his colleagues as it lumped Plaintiff in with the people Defendant GASCON referred to as the
24 “cancer” in the Bureau of Investigations who were engaging in purported illegal conduct.
25 Specifically, Plaintiff was informed that he was being placed on leave for providing false
26 information to a federal agency. That allegation against Plaintiff itself was false.

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1 **C. THE PURPORTED FALSE INFORMATION**

2 58. Plaintiff MCKENZIE supervised Investigator Doe while serving as a senior
3 district attorney investigator within the District Attorney's Office. Unbeknownst to Plaintiff,
4 Investigator Doe contacted the TSA to report Defendant GASCON's unlawful travel on or
5 about spring 2017.

6 59. On or about early summer 2017, Defendant GASCON terminated Investigator
7 Doe.

8 60. Plaintiff was not privy to the facts leading to Investigator Doe's termination.

9 61. Because Plaintiff MCKENZIE had been Investigator Doe's supervisor, on or
10 about August 2017, Investigator Doe reached out to Plaintiff MCKENZIE and requested a
11 personal reference letter from Plaintiff given that Investigator Doe was applying for a federal
12 law enforcement job.

13 62. Plaintiff MCKENZIE agreed to provide a personal reference letter. On or about
14 August 2017, Plaintiff received a form – INV FORM 41 – from the federal government
15 addressed to Plaintiff in his personal capacity and requesting him to fill the form out on behalf
16 of Investigator Doe. The form contained six or seven multiple-choice questions, which were
17 supposed to be answered out by filling out a Scantron form. One of the questions asked if the
18 information on the form, stating that Plaintiff MCKENZIE had been Investigator Doe's
19 "supervisor" was correct. Plaintiff MCKENZIE bubbled in "Yes."

20 63. Another question asked if Investigator Doe was eligible for rehire. Plaintiff
21 MCKENZIE, relying solely on the facts that he knew, opined and bubbled in the box for
22 "Yes." Nonetheless, Plaintiff also stated on the reference form that Investigator Doe had been
23 terminated. Plaintiff MCKENZIE expected that the hiring agency would reach out to him with
24 any questions regarding Investigator Doe's separation from the department. Plaintiff
25 MCKENZIE filled out the personal reference form truthfully and to the best of his knowledge.

26 64. Unbeknownst to Plaintiff, Defendants obtained a copy of the reference letter
27 that Plaintiff had filled out on behalf of Investigator Doe in his personal capacity. Believing
28 that Plaintiff was the anonymous whistleblower and believing that Plaintiff was knowingly

1 assisting Investigator Doe, the TSA whistleblower, Defendants retaliated against Plaintiff.
2 Specifically, Defendants contended that Plaintiff had intentionally misled federal authorities
3 because (i) Plaintiff was not Investigator Doe's supervisor, and (ii) Investigator Doe was not
4 eligible for rehire. Based on those allegations, Defendant GASCON, acting by and through
5 Defendants CREW and RODRIGUEZ, terminated Plaintiff from the District Attorney's on
6 October 30, 2017.

7 65. Plaintiff appealed his termination and provided evidence showing that (i) he was
8 Investigator Doe's supervisor, and (ii) he had not in any way misled federal authorities by
9 submitting a reference letter. (In fact, the federal agency in question ultimately offered
10 Investigator Doe a position.) Despite such showing, Defendants upheld Plaintiff's termination.

11 66. During the course of the review, Plaintiff also informed/blew the whistle on
12 Defendants by informing them that they had violated Investigator Doe's right to privacy by
13 sharing with Plaintiff and his counsel the rationale for the decision to terminate Investigator
14 Doe – private personnel matters to which Plaintiff was not privy. In fact, Plaintiff informed
15 Defendants that such revelation was a crime – a violation of Penal Code § 832.7.

16 67. Upon information and belief, the purported reason for Plaintiff's termination
17 was pretextual. Plaintiff was fired in retaliation for his perceived whistleblowing (and support
18 thereof) and to chill his First Amendment rights of free speech. In fact, several Defendants
19 have engaged in very serious and even unlawful conduct and have faced no disciplinary action.

20 68. To exacerbate matters, following Plaintiff's termination, Defendants informed
21 multiple third parties, following Plaintiff's termination on October 30, 2017 through early
22 2018, that Plaintiff was being investigated for so-called *Brady* issues – concerns about
23 Plaintiff's honesty that have to be disclosed to defense attorneys in criminal prosecutions.

24 69. Plaintiff has no *Brady* issues; instead, Defendants have made such statements in
25 a further effort to retaliate and injure Plaintiff. Said efforts have been successful given that
26 Plaintiff sought other employment following his termination and was rejected for employment
27 on several occasion due to Defendants' statements. Plaintiff continues to suffer injuries arising
28

1 from Defendants' tortious actions in violation of the state law and the United States
2 Constitution.

3 70. In a further act of retaliation, Defendant CCSF has recently informed Plaintiff
4 that he has a *Brady* issue arising from his federal Complaint filed on November 24, 2018.
5 Because of that action, Plaintiff is not being asked to testify in a criminal matter, which could
6 potentially result in a murderer's acquittal. Moreover, by virtue of this action, Plaintiff now has
7 a black mark on an otherwise stellar law enforcement record.

8
9 **VIII. CAUSES OF ACTION**

10 **FIRST CLAIM**

11 **VIOLATION OF CALIFORNIA LABOR CODE § 1102.5; 6310**

12 **(Against All Defendants and Does 1 to 10)**

13 71. Plaintiff incorporates by reference as though fully set forth herein, each and
14 every allegation set forth above in this Complaint. As a separate and distinct cause of action for
15 relief, Plaintiff complains against Defendants CCSF and Does 1 through 20 only as follows:

16 72. Cal. Labor Code § 1102.5(b) prevents an employer from retaliating against an
17 employee for "disclosing information, or because the employer believes that the employee
18 disclosed or may disclose information, to a government or law enforcement agency, to a person
19 with authority over the employee or another employee who has the authority to investigate,
20 discover, or correct the violation or noncompliance, or for providing information to, or
21 testifying before, any public body conducting an investigation" relating to a violation of state
22 and/or federal law.

23 73. Cal. Labor Code § 6310. Provides:

24 (a) No person shall discharge or in any manner discriminate against any employee
25 because the employee has done any of the following:

26 (1) Made any oral or written complaint to the division, other governmental agencies
27 having statutory responsibility for or assisting the division with reference to employee
28 safety or health, his or her employer, or his or her representative.

1 (2) Instituted or caused to be instituted any proceeding under or relating to his or her
2 rights or has testified or is about to testify in the proceeding or because of the exercise
3 by the employee on behalf of himself, herself, or others of any rights afforded him or
4 her.

5 (3) Participated in an occupational health and safety committee established pursuant to
6 Section 6401.7.

7 (b) Any employee who is discharged, threatened with discharge, demoted, suspended,
8 or in any other manner discriminated against in the terms and conditions of
9 employment by his or her employer because the employee has made a bona fide oral or
10 written complaint to the division, other governmental agencies having statutory
11 responsibility for or assisting the division with reference to employee safety or health,
12 his or her employer, or his or her representative, of unsafe working conditions, or work
13 practices, in his or her employment or place of employment, or has participated in an
14 employer-employee occupational health and safety committee, shall be entitled to
15 reinstatement and reimbursement for lost wages and work benefits caused by the acts of
16 the employer. Any employer who willfully refuses to rehire, promote, or otherwise
17 restore an employee or former employee who has been determined to be eligible for
18 rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by
19 law, is guilty of a misdemeanor.

20 72. As herein above alleged, Plaintiff was subjected retaliation for participating in
21 Union meetings discussing federal law violations, for writing a personal reference letter to a
22 whistleblower, for informing Defendants that they had violated state penal law, and for being
23 believed to have been a whistleblower or future whistleblower.

24 73. Defendants CCSF and, acting through its various employees, including the other
25 Defendants retaliated against Plaintiff, as hereinabove alleged, including a continuing,
26 connected series of retaliatory acts that continue to this date including terminating Plaintiff.
27 Such actions by Defendants CCSF violated Labor Code §§ 1102.5 and 6310 in that they
28 constituted retaliation.

1 74. As a direct, foreseeable and legal result of Defendants' conduct, Plaintiff has
2 suffered and continues to suffer substantial damages including losses in earnings, seniority,
3 work credits, retirement and other employment benefits in an amount to be proven at trial.

4 75. As a direct, foreseeable and legal result of Defendants' conduct, Plaintiff has
5 suffered and continues to suffer humiliation, embarrassment, mental, emotional distress and
6 discomfort, all to Plaintiff Faith's detriment in an amount to be proven at trial.

7 76. By reason of Defendants' unlawful conduct, and in order to enforce his
8 important rights, Plaintiff has incurred and will incur legal expenses including attorneys' fees
9 and costs to remedy the wrongs perpetrated by Defendants and each of them. Plaintiff is
10 therefore entitled to reasonable attorneys' fees and costs as a matter of law pursuant to, inter
11 alia California Code of Civil Procedure § 1021.5, California Labors Code §§ 1102.5 and 6310;
12 Government Code § 12900 et seq. and California Labor Code § 2968. Additionally, Plaintiff is
13 entitled to punitive damages as to the individual defendants.

14 WHEREFORE, Plaintiff requests relief as herein set forth in the Prayer.

15
16 **SECOND CLAIM FOR RELIEF**

17 **CIVIL RIGHTS VIOLATION -- (42 U.S.C. § 1983**

18 **First Amendment Violation Against all Defendants and Does 1-10)**

19 77. Plaintiff incorporates by reference as though fully set forth herein, each and
20 every allegation set forth above in this Complaint. As a separate and distinct claim for relief,
21 Plaintiff complains against all Defendants as follows:

22 78. Plaintiff alleges that Defendants, including Does 1-10, acting under color of
23 law, jointly and/or severally, deprived Plaintiff of those rights, privileges and immunities
24 secured by the United States Constitution as incorporated and applied to the states by and
25 through the Fourteenth Amendment: Through the foregoing acts, and each of them, the
26 Defendants sought to and did retaliate, chill and suppress Plaintiff's exercise of his
27 constitutional right of free speech and did so under color of their authority as law enforcement
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1 officers. Defendants' efforts in this regard were also intended to protect Defendant GASCON's
2 federal violations under color.

3 79. Plaintiff's targeted speech (which includes discussing potential criminal
4 violations by Defendant GASCON by and through Plaintiff's union activity, providing
5 Investigator Doe a personal reference letter, and the filing of the instant complaint) was done in
6 his capacity as a private citizen, outside his chain of command, and outside work hours;

7 80. The subject matter of Plaintiff's speech was not typical of his job duties;

8 81. Defendants took adverse employment actions against Plaintiff due to his speech,
9 including, most recently, opening a *Brady* inquiry into Plaintiff arising from the allegations
10 contained in his Complaint;

11 82. Plaintiff's speech was a substantial or motivating factor for the adverse
12 employment actions and retaliatory behavior by Defendants;

13 83. As a result of the foregoing, Plaintiff has been damaged economically and non-
14 economically in an amount unknown to him, but to be proven at time of trial.

15 84. By reason of Defendants' unlawful conduct, and in order to enforce his
16 important rights, Plaintiff has incurred and will incur legal expenses including attorneys' fees
17 and costs to remedy the wrongs perpetrated by Defendants and each of them. Plaintiff is
18 therefore entitled to reasonable attorneys' fees and costs as a matter of law. Additionally,
19 Plaintiff is entitled to punitive damages as to the individual defendants.

20
21 **THIRD CLAIM FOR RELIEF**

22 **DISCRIMINATION ON THE BASIS OF AGE IN VIOLATION OF TITLE VII AND THE FEHA**
23 **(AGAINST DEFENDANT CCSF)**

24 85. Plaintiff incorporates herein by reference the preceding Paragraphs of this
25 Complaint as fully set forth herein. This cause of action is alleged against Defendant CCSF.

26 86. Title VII and the FEHA prohibit an employer from discriminating against an
27 employee on the basis of age. Specifically, Title VII and the FEHA provide that it is unlawful
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1 to “discriminate against any individual with respect to his compensation, terms, conditions, or
2 privileges of employment,” based on the individual’s age.

3 87. Defendant CCSF’s actions negatively affected the terms and conditions of
4 Plaintiff’s employment. A substantial motivating factor for Defendant’s unlawful actions was
5 discrimination based on Plaintiff age.

6 88. Plaintiff sustained an adverse employment action by Defendant as heretofore
7 alleged.

8 89. As a direct and proximate result of Defendant’s discriminatory actions, Plaintiff
9 has suffered, embarrassment, loss of dignity, great humiliation, and emotional distress.

10 90. As a direct, foreseeable and proximate result of Defendant’s acts, Plaintiff has
11 suffered and continues to suffer loss of promotional opportunities, training opportunities,
12 economic losses, lost benefits, and other consequential and foreseeable damages.

13 91. By reason of Defendant’s unlawful conduct, and to enforce the important right
14 to a discrimination and harassment-free workplace, for Plaintiff and the public at large,
15 Plaintiff has incurred and continues to incur legal expenses and attorney fees. Plaintiffs are
16 therefore entitled to reasonable attorneys’ fees and litigation expenses pursuant to 29 U.S.C. §
17 216(b) and C.C.P. §1021.5 and Government Code §§ 12940(a) and 12965(b).

18 WHEREFORE, Plaintiffs pray for relief as set forth herein.

19
20 **FOURTH CLAIM FOR RELIEF**

21 **FAILURE TO INVESTIGATE AND PREVENT DISCRIMINATION**

22 **VIOLATION OF CALIFORNIA GOVERNMENT CODE § 12940(K)**

23 **(AGAINST DEFENDANT CCSF)**

24 92. Plaintiff incorporates herein by reference the preceding Paragraphs of this
25 Complaint as fully set forth herein. This cause of action is alleged against Defendant CCSF.

26 93. California Government Code § 12940(k) provides that it is an unlawful
27 employment practice for an employer to fail to take all reasonable steps necessary to prevent
28 discrimination, retaliation, and harassment from occurring in the workplace.

1 94. Defendant violated Government Code §12940 with regard to Plaintiff when
2 Defendant knowingly and recklessly failed to investigate Plaintiff's concerns and complaints
3 regarding discrimination and retaliation against Plaintiff on the basis of age discrimination.
4 Defendant failed to conduct a meaningful, effective, reasonable and impartial investigation
5 when Plaintiff complained about discriminatory conduct and failed to take reasonable steps
6 necessary to investigate the misconduct and prevent it from occurring and continuing.

7 95. Defendant's conduct toward Plaintiff as alleged above, constitutes an unlawful
8 employment practice in violation of California Government Code §12940 *et. seq.*

9 96. As a direct and proximate result of Defendant's unlawful actions, Plaintiff
10 suffered loss of employment opportunities, loss of dignity, great humiliation, and emotional
11 injuries and emotional distress.

12 97. Defendant's actions have caused and continue to cause Plaintiff substantial
13 losses in earnings, significant reputation and professional injury, loss of promotional
14 opportunities and other employment benefits, lost wages, attorneys' fees, medical expenses,
15 loss of future earnings and benefits, loss of benefits, cost of suit, humiliation, embarrassment
16 and anguish, all to his damage in an amount according to proof.

17 98. As a direct and proximate result of Defendant's retaliatory conduct, Plaintiff has
18 suffered loss of employment, indignity, great humiliation and emotional distress.

19 99. By reason of Defendant's unlawful conduct, and in order to enforce the
20 important right to a discrimination and harassment-free workplace, both for Plaintiff and the
21 public at large, Plaintiff has incurred and continues to incur legal expenses and attorney fees.
22 Plaintiff is therefore entitled to reasonable attorneys' fees and litigation expenses per C.C.P.
23 §1021.5 and Cal. Gov. Code §12965(b).

24 WHEREFORE, Plaintiffs pray for relief as set forth herein.

25
26 **FIFTH CLAIM FOR RELIEF**

27 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

28 **(AGAINST ALL DEFENDANTS)**

X. PRAYER FOR RELIEF

Wherefore Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. Reinstatement with full back pay, benefits, service credits and retirement contributions;

2. For a money judgment representing compensatory damages including medical expenses, both past and future, lost wages, earnings, lost retirement benefits and other employee benefits, and all other sums of money, and all other special and general damages according to proof, together with interest on these amounts, according to proof;

3. For an award of money judgment for emotional distress, according to proof;

4. For prejudgment and post-judgment interest;

5. For declaratory and affirmative and injunctive relief as follows:

(a) for an injunction restraining Defendants, and each of them, from continuing or maintaining any policy, practice, custom or usage which discriminates against any employee in violation of FEHA, Cal. Gov. Code §§ 12900 *et seq.*;

(b) for an injunction restraining Defendants, and each of them, along with their supervising employees, agents and all those subject to its control or acting in concert with it from causing, encouraging, condoning or permitting the practice of discrimination, retaliation or willful violations of FEHA, Cal. Gov. Code §§ 12900 *et seq.*;

(c) for affirmative relief requiring Defendants, and each of them, to develop clear and effective policies and procedures for employees complaining of retaliation or violations of FEHA, Cal. Gov. Code §§ 12900 *et seq.*, so they may have their complaints promptly and thoroughly investigated (by a neutral fact finder) and informal as well as formal processes for hearing, adjudication and appeal of the complaints; and,

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EXHIBIT 1

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY



GEORGE GASCÓN
District Attorney

JAMES R. THOMPSON
Brady Committee, Chair
DIRECT DIAL: (415) 734-3282
E-MAIL: james.thompson@sfgov.org

PERSONAL & CONFIDENTIAL

January 8, 2019

Henry G. McKenzie
c/o Fulvio F. Cajina, Esq.
Law Office of Fulvio F. Cajina
311 Oak Street, Suite 108
Oakland, CA 94607

Re: *Brady* List

Dear Mr. McKenzie:

I write to notify you that the Trial Integrity Unit of the District Attorney's Office recently learned of information that must be disclosed to the defense pursuant to *Brady v. Maryland* (1963) 373 U.S. 82, in cases in which you may be a prosecution witness.

Brady v. Maryland requires that in a criminal case, the prosecution disclose material exculpatory evidence to the defense. The *Brady* obligation requires disclosure of "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) Based on our review of the civil complaint for damages in *Henry G. McKenzie v. City and County of San Francisco, et al.*, Case No. 3:18-cv-7141, specifically section "C. The Purported False Information", it appears that the District Attorney's Office may be required under *Brady v. Maryland* to disclose this information and related documents to the defense in cases in which you are a material witness.

The District Attorney's Office has adopted a policy for analyzing complaints of peace officer misconduct to determine whether disclosures are required in cases in which the peace officer will be a prosecution witness. The policy includes the opportunity for the affected peace officer and the employing agency to provide input unless criminal charges were filed. If the District Attorney's Office determines that *Brady* evidence exists regarding a current or former peace officer witness, the peace officer's name is placed on a *Brady* list, and disclosures are made to the defense when that peace officer is a prosecution witness.

We are providing you with the opportunity to provide any written comments, objections and/or additional information before we make a final decision as to whether

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY

Date: January 8, 2019
Page 2

the above information constitutes *Brady* evidence. You may wish to consult with legal counsel and/or your peace officers' association. We request that you respond to us within 5 days of receipt of this letter, and in any case by January 15, 2019. Because you are a prosecution witness in *People v. Richard Contreras*, MCN 16003117, and will likely testify before that date, the District Attorney's Office is obliged to disclose this information sooner to comply with the mandate of state and federal discovery laws.

Very truly yours,



James R. Thompson
Brady Committee, Chair
Trial Integrity Unit

cc: File