

# CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Before completing this form please read the instructions on the back. Untimely claims will be returned. Please submit this form and supporting documentation to the Controller's Office, Claims Division, 1390 Market Street, 7<sup>th</sup> Floor, San Francisco, CA 94102 in person or by mail.

\* = REQUIRED    \*\* = REQUIRED IF KNOWN

<b>1. Claimant's Name and Home Address (Please Print Clearly)</b> * Mayra Perez & the Estate of Abel Esquivel c/o 840 Malcolm Road, Suite 200 City <u>Burlingame</u> State <u>CA</u> Zip <u>94010</u> Telephone <small>Daytime Evening Cellular</small> (650) 697-6000	<b>2. Send Official Notices and Correspondence to:</b> * Alison Cordova of Cotchett, Pitre & McCarthy 840 Malcolm Road, Suite 200 City <u>Burlingame</u> State <u>CA</u> Zip <u>94010</u> Telephone <small>Daytime Evening Cellular</small> (650) 697-6000
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<b>3. Date of Birth</b>	<b>4. Social Security Number</b>	<b>5. Date of Incident</b> * 08/15/2017	<b>6. Time of Incident (AM or PM)</b> ** 2 AM
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<b>7. Location of Incident or Accident</b> ** 26th St. & S. Van Ness Ave, San Francisco, CA	<b>8. Claimant Vehicle License Plate #, Type, Mileage, and Year</b> ** N/A
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**9. Basis of Claim. State in detail all facts and circumstances of the incident. Identify all persons, entities, property and City departments involved. State why you believe the City is responsible for the alleged injury, property damage or loss.**  
 \* See attachment with supporting exhibits.

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Name, I.D. Number and City Department of City Employee who allegedly caused injury or loss	Type of City Vehicle	Vehicle License Number and Bus or Train Number
** Officer Marvin Cabuntala, SFPD	** N/A	** N/A

**10. Description of Claimant's injury, property damage or loss**  
 \* See attachment with Supporting exhibits.

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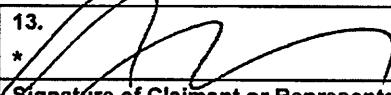
**11. Amount of Claimant's property damage or loss and method of computation. Attach supporting documentation. (See Instructions)**

ITEMS

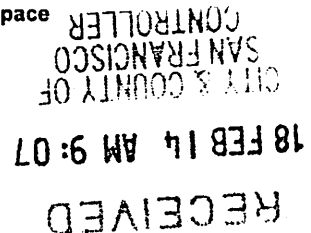
* See attached exhibits	\$ _____
A & B	\$ _____
_____	\$ _____
_____	\$ _____
<b>TOTAL AMOUNT</b>	<b>\$ _____</b>

Court Jurisdiction: Limited (up to \$25,000)   
 Unlimited (over \$25,000)

12. Witnesses (if any) Name	Address	Telephone
1. _____	_____	_____
2. _____	_____	_____

13. *  Signature of Claimant or Representative Alison E. Cordova Print Name	2/13/18 Date atty for clmnt Relationship to Claimant
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RECEIVED  
 18 FEB 14 AM 9:07  
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CA/FORM 02/14

**CRIMINAL PENALTY FOR PRESENTING A FALSE OR FRAUDULENT CLAIM IS IMPRISONMENT OR FINE OR BOTH. (PENAL CODE §72)**

**ATTACHMENT WITH SUPPORTING EXHIBITS  
TO GOVERNMENT CLAIM AGAINST CCSF, SFPD & CABUNTALA**

**I. INTRODUCTION**

**CLAIMANTS MAYRA PEREZ**, individually and as heir to **ABEL ENRIQUE ESQUIVEL, JR.**, deceased, and the **ESTATE OF ABEL ENRIQUE ESQUIVEL, JR.** (collectively "**CLAIMANTS**"), bring this action under the California Government Tort Claims Act against the City and County of San Francisco ("**CCSF**"), the San Francisco Police Department ("**SFPD**"), and San Francisco Police Officer Marvin Cabuntala ("**CABUNTALA**") (collectively "**RESPONDENTS**") for their combined negligence, negligence *per se*, and/or refusal to carry out mandatory duties to safely and securely store, transport, use, and/or handle firearms and ammunition. Whether singularly, and/or in combination, their wrongful conduct granted criminals access to a loaded firearm which was foreseeably used to commit further crimes, including the horrific shooting of **ABEL ENRIQUE ESQUIVEL, JR.** ("**ABEL**") on August 15, 2017, at approximately 2 a.m., in the Mission District of San Francisco.

**II. PARTIES**

**A. CLAIMANTS**

**Abel Enrique Esquivel, Jr.** ("**ABEL**"), deceased, was at all times relevant to this claim a resident of the City and County of San Francisco. **ABEL** was the son of Mayra Perez.

**Mayra Perez** ("**MAYRA**") is, and at all times relevant to this claim was, a resident of the City and County of San Francisco. **MAYRA** was the mother of **ABEL**, and is a proper personal representative and heir pursuant to Code of Civil Procedure section 337.60(a).

**MAYRA**, by virtue of the premises, is lawfully entitled to initiate this claim in her individual capacity, as well as on behalf of the **ESTATE OF ABEL ESQUIVEL** ("**ESTATE**") in pursuit of a survival action arising out of his death.

**B. RESPONDENTS**

**CCSF** is an incorporated municipality and public entity responsible for the safety and welfare of residents of San Francisco.

**SFPD** is a public agency of **CCSF** responsible for protecting the public and providing security and law enforcement in **CCSF**.

**CABUNTALA** is an individual who serves as a San Francisco Police Officer, agent, representative and/or employee of **SFPD**.

### **III. FACTUAL BACKGROUND**

#### **A. THE DEATH OF ABEL ESQUIVEL**

On August 15, 2017, at approximately 2 a.m., **ABEL**—a twenty-three year old San Francisco native—finished working the late night shift at his local marketplace on or around 26<sup>th</sup> Street and South Van Ness Avenue in the Mission District, when he was brutally and senselessly shot with a .38 caliber Smith and Wesson revolver that had been stolen from a San Francisco police officer’s vehicle only days beforehand. The shooting occurred on the street, just one block from the home where **ABEL** lived with his mother and had been raised. After being shot, **ABEL** attempted to make it home to his mother, staggering down the block while dying and struggling to take every step – not even knowing who shot him or why. Before **ABEL** could make it home, responding police officers and paramedics found him and rushed him to the hospital.

Despite best efforts by medical professionals, **ABEL** succumbed to his injuries within hours after the shooting. At the time of his death, **ABEL** was a loving and committed son, brother, and uncle of two that lived with and took care of his mother in the Mission District of San Francisco, where **ABEL** was born and raised. **ABEL** was compassionate, hard-working and coming into his own as a man, enrolled at and pursuing a criminal justice degree at San Francisco City College and giving back to his birthplace and community in the Mission District by volunteering with CARECEN, a non-profit that “empowers and responds to the needs, rights and aspirations of Latino, immigrant, and under-resourced families in the San Francisco Bay Area.”<sup>1</sup>

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<sup>1</sup> Available at: <https://carecensf.org/>.

## B. THE STOLEN FIREARM

According to San Francisco Police Union President, Martin Halloran, “the veteran officer [CABUNTALA] didn’t know his gun was missing until after the fatal shooting.”<sup>2</sup> This is despite being “a highly decorated veteran,” according to Halloran.<sup>3</sup> Apparently, it was not discovered the firearm was stolen until after the police seized the firearm during a search warrant on or about August 18, 2017, when the police arrested Mr. Garcia-Pineda, one of three persons arrested and charged in the shooting of ABEL.<sup>4</sup> “The officer maintains that he did not know it was stolen because there was no sign of a break-in, police union officials have said. Court documents show, however, that a speed loader, jacket and holster were taken from his car at the time the gun was stolen,”<sup>5</sup> indicating that the handgun was left unsecured in the vehicle along with the other items. It is also highly suspicious that CABUNTALA, a highly decorated police veteran, did not notice the numerous missing items from his vehicle within the approximate one week’s time that the items were missing.

San Francisco Police Department reported to the press immediately following the event that the stolen .38 caliber Smith and Wesson was the “cop’s personal gun stolen from his personal car.”<sup>6</sup> Another news outlet reported that on August 11, 2017 (only four days before ABEL’s death) the “.38 caliber revolver off-duty weapon”, “was taken from a San Francisco police officer’s car parked out front of his San Francisco home.”<sup>7</sup> Yet another news report

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<sup>2</sup> FoxNews.com (Sept. 15, 2017) “Illegal immigrant murder suspect shot man with gun stolen from cop, report says,” available at: <http://www.foxnews.com/us/2017/09/15/illegal-immigrant-murder-suspect-shot-man-with-gun-stolen-from-cop-report-says.html>.

<sup>3</sup> Sernoffsky, Evan and Ho, Vivian, “Anguish, outrage over street killing of SF man with gun stolen from cop,” SFGate.com (Sept. 14, 2017) available at: <https://www.sfgate.com/crime/article/Anguish-outrage-over-street-killing-of-SF-man-12199165.php#item-85307-tbla-5>.

<sup>4</sup> Van Derbeken, Jaxon, “ICE Confirms Teen Accused of Stealing San Francisco Officer’s Gun, Killing Community Activist Was Being Monitored” NBCBayArea.com (Sept. 15, 2017) available at: <https://www.nbcbayarea.com/news/local/Teen-Wanted-for-Deportation-Is-Accused-of-Stealing-San-Francisco-Police-Officers-Gun-Killing-Community-Activist-444726323.html>.

<sup>5</sup> Id.

<sup>6</sup> FoxNews.com (Sept. 15, 2017) “Illegal immigrant murder suspect shot man with gun stolen from cop, report says,” available at: <http://www.foxnews.com/us/2017/09/15/illegal-immigrant-murder-suspect-shot-man-with-gun-stolen-from-cop-report-says.html>.

<sup>7</sup> Van Derbeken, Jaxon, “ICE Confirms Teen Accused of Stealing San Francisco Officer’s Gun, Killing Community Activist Was Being Monitored” NBCBayArea.com (Sept. 15, 2017) available at: <https://www.nbcbayarea.com/news/local/Teen-Wanted-for-Deportation-Is-Accused-of-Stealing-San-Francisco-Police-Officers-Gun-Killing-Community-Activist-444726323.html>.

provides a somewhat contradictory account: “[t]hree days earlier, on Aug. 12, Perez-Araujo and Pineda stole a silver .38-caliber Smith & Wesson revolver as well as ammunition from a car that belonged to San Francisco police Officer Marvin Cabuntala... . Police Department officials would not elaborate on the circumstances of the theft. They did not say where the vehicle was parked, what time of day it was burglarized, whether the car was locked, and where the gun had been stored. There was no indication Thursday that the gun had been recovered after the slaying.”<sup>8</sup>

Regardless of the conflicting news reports, it has been widely reported that the San Francisco Police Department is investigating CABUNTALA’s failure to secure his firearm, implying the handgun and/or vehicle is related to or somehow connected with CABUNTALA’s employment with the San Francisco Police Department. According to SFGate.com: “they opened an internal investigation into the theft, which could lead to discipline for the officer.”<sup>9</sup> Further, according to NBCBayArea.com, “Police Chief William Scott acknowledged late Thursday that police ‘have to investigate the circumstances of how the officer’s gun was stolen and that’s an internal investigation that’s ongoing.’”<sup>10</sup>

According to reports from U.S. Immigration and Customs Enforcement (“ICE”), one of ABEL’s shooters, Mr. Garcia-Pineda, was wearing a tracking device, which confirmed that he was at the scene of the slaying, along with two other shootings and five robberies, all perpetrated after stealing CABUNTALA’s loaded firearm.<sup>11</sup>

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<sup>8</sup> Sernoffsky, Evan and Ho, Vivian, “Anguish, outrage over street killing of SF man with gun stolen from cop,” SFGate.com (Sept. 14, 2017) available at: <https://www.sfgate.com/crime/article/Anguish-outrage-over-street-killing-of-SF-man-12199165.php#item-85307-tbla-5>.

<sup>9</sup> Id.

<sup>10</sup> Van Derbeken, Jaxon, “ICE Confirms Teen Accused of Stealing San Francisco Officer’s Gun, Killing Community Activist Was Being Monitored” NBCBayArea.com (Sept. 15, 2017) available at: <https://www.nbcbayarea.com/news/local/Teen-Wanted-for-Deportation-Is-Accused-of-Stealing-San-Francisco-Police-Officers-Gun-Killing-Community-Activist-444726323.html>.

<sup>11</sup> Id.

#### **IV. LIABILITY**

##### **A. FAILURE TO PERFORM MANDATORY DUTIES**

**CLAIMANTS** allege, that at all times herein mentioned, **RESPONDENTS**, and each of them, were under a mandatory statutory duty to comply with California Penal Code sections 25452 and 25140 and San Francisco Police Code Article 36B: Storage of Firearms in Motor Vehicles according to California Government Code sections 815, 815.2 and 815.6. Furthermore, **RESPONDENTS** were under a mandatory statutory duty to comply with **SFPD** policies, including the **SFPD** department policy on storage of weapons in unattended vehicles, which requires officers to store the weapon in a locked container that is affixed to the vehicle.<sup>12</sup>

The aforementioned mandatory duties were breached when **RESPONDENTS**: (a) left a loaded handgun in an unattended vehicle, (b) failed to lock the handgun in the vehicle's truck, (c) failed to lock the handgun in a locked container and place the container out of plain view, (d) failed to lock the handgun in a locked container that is permanently affixed to the vehicle's interior and not in plain view, (e) failed to provide SF police officers, including **CABUNTALA**, with sufficient locked containers to store their handguns, (f) failed to provide SF police officers, including **CABUNTALA**, with sufficient locked containers that permanently affix to the inside of a vehicle, and/or (g) failed to train SF police officers to properly secure and/or store handguns.

As a direct and legal result of said violations and of the aforementioned acts and/or omissions by **RESPONDENTS**, decedent **ABEL** was shot, severely injured and later died.

As a direct and legal result of said violations and of the aforementioned acts and/or omissions by **RESPONDENTS**, **CLAIMANTS** suffered the damages as set forth below.

##### **B. GENERAL NEGLIGENCE AND NEGLIGENCE *PER SE***

**CLAIMANTS** allege, that at all times herein mentioned, **RESPONDENTS**, and each of them, acted negligently, carelessly, recklessly, and/or unlawfully in (a) leaving a loaded handgun

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<sup>12</sup> Batey, Eve, "Yet Another Gun is Stolen From a Cop, Yet Another San Franciscan Dies," SFist.com (Sept. 14, 2017) available at: [http://sfist.com/2017/09/14/yet\\_another\\_gun\\_is\\_stolen\\_from\\_a\\_co\\_1.php](http://sfist.com/2017/09/14/yet_another_gun_is_stolen_from_a_co_1.php).

in an unattended vehicle, (b) failing to lock the handgun in the vehicle's trunk, (c) failing to lock the handgun in a locked container and place the container out of plain view, (d) failing to lock the handgun in a locked container that is permanently affixed to the vehicle's interior and not in plain view, (e) failing to provide SF police officers, including **CABUNTALA**, with sufficient locked containers to store their handguns, (f) failing to provide SF police officers, including **CABUNTALA**, with sufficient locked containers that permanently affix to the inside of a vehicle, and/or (g) failing to train SF police officers to properly secure and/or store handguns. **CCSF** and/or **SFPD** are also vicariously responsible for **CABUNTALA**'s negligent, careless, reckless, and/or unlawful acts and/or omissions that legally resulted in the death of **ABEL** pursuant to California Government Code section 815 and 815.2.

The aforementioned negligent, careless, reckless, and/or unlawful acts and/or omissions were also in violation of California Penal Code sections 25452 and 25140 and San Francisco Police Code Article 36B: Storage of Firearms in Motor Vehicles, which were designed to prevent the theft of law enforcement and/or government-issued handguns, as well as the resulting violence perpetrated by criminals with the stolen government handguns. As a non-criminal and lawful resident of the State of California, **ABEL** was one of the class of persons for whose protection California Penal Code sections 25452 and 25140 were adopted. Notably, after **ABEL**'s death, Senator Jerry Hill, one of the main proponents of passing California Penal Code section 25452, called "for law enforcement officers and their departments to ensure that guns be stowed safely, securely and out of sight, if it is necessary to leave them in an unattended car. He also urged that maximum penalties be leveled against officers who fail to follow state law and their department's rules on gun storage." Furthermore, Senator Hill urged "Every day, California police officers, sheriff's deputies and investigators from law enforcement's many branches see firsthand how lives are lost and how families are shattered by gun violence. ... It is impossible to urge too strongly that these sworn officers of the law use common sense and care when it comes to the handling and storage of their own firearms. We hold our law enforcement officers to the highest standards because we expect them to embody our finest qualities and we entrust our safety to them." Senator

Hill implored: “Today I call for every law enforcement officer in California to step up, to make sure that they and their colleagues uphold our state law and their department's rules on safe, secure gun handling and storage. And I urge that officers who fail to follow the law or department policy be held accountable and face the maximum penalties possible.” “These alarming, persistent thefts have involved only a fraction of the thousands of sworn officers in our state, but it is clear that it will take every law enforcement officer in California, the leadership of their departments and prosecutors working together to end what has become a seemingly unceasing – and, if truth be told, embarrassing – pattern. These thefts are preventable and the tragedies that all-too-often ensue are preventable.”<sup>13</sup>

**ABEL** was also of the class of persons for whose protection San Francisco Police Code Article 36B: Storage of Firearms in Motor Vehicles was also adopted. “Former Supervisor David Campos, who launched the locked container regulations back in 2015, told NBC Bay Area that his law was proposed specifically to avoid tragedies like this one.”<sup>14</sup> Furthermore, Article 36B, section 3600B documents the extensive “findings” that led to the enactment of the city ordinance, which requires that firearms left in unattended vehicles be stored in a locked trunk or in a locked box that is permanently affixed to the vehicle:

(a) A report by the U.S. Department of Justice, Bureau of Justice Statistics, found that 1.4 million firearms were stolen across the country from 2005 through 2010. This number represents an estimated average of 232,400 firearms stolen each year – about 172,000 stolen during burglaries and 60,300 stolen during other property crimes. The report also found that the vast majority – at least 80 percent – were never recovered.

(b) Auto burglaries in dense urban areas are on the rise, and San Francisco has seen an absolute explosion of auto burglaries. According to the San Francisco Police Department’s crime data, an alarming 47 percent spike in San Francisco car burglaries has occurred in the first half of this year. From beginning of January through the end of June of 2015 there have been 11,917 reported vehicle burglaries in the City and County of San Francisco. That same number during the same time period escalated 62 percent from 2013. And it has skyrocketed to 171 percent from

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<sup>13</sup> Riechel, Robert “CA Senator Jerry Hill on Police Securing Guns,” Patch.com (Sept. 26, 2017) available at: <https://patch.com/california/sanbruno/ca-senator-jerry-hill-police-securing-guns>.

<sup>14</sup> Batey, Eve, “Yet Another Gun is Stolen From a Cop, Yet Another San Franciscan Dies,” SFist.com (Sept. 14, 2017) available at: [http://sfist.com/2017/09/14/yet\\_another\\_gun\\_is\\_stolen\\_from\\_a\\_co\\_1.php](http://sfist.com/2017/09/14/yet_another_gun_is_stolen_from_a_co_1.php).



2010, a year that saw 4,396 reported vehicle burglaries between January and the end of June.

(c) Recently, auto burglaries in the San Francisco Bay Area have resulted in the theft of firearms from vehicles. In July, a San Francisco resident was killed by someone using a handgun stolen four days earlier from a federal agent's car in downtown San Francisco. In August, a firearm was stolen from the UC Berkeley Police Chief's vehicle at Point Isabel Regional Shoreline in Richmond, California. In October of 2015, a gun was stolen from a California Highway Patrol officer's vehicle in the South of Market area of San Francisco. In the same month, three individuals were charged with murdering a woman in Golden Gate Park and a second victim in Marin using a handgun stolen from a car at Fisherman's Wharf. In late October, police officials recovered two stolen guns from cars in the home of a suspected serial auto burglar.

(d) These recent auto burglaries resulting in the theft of firearms have been from unattended vehicles. The City and County of San Francisco finds that it has a strong local interest in preventing the theft of firearms from unattended vehicles and that requiring reasonable measures to secure firearms left in attended vehicles will reduce gun thefts and prevent guns from falling into the hands of criminals.

**RESPONDENTS'** actions were not discretionary, as these acts and/or omissions directly violated clearly established state and local laws and policies of SFPD.

As a direct and legal result of said violations and of the aforementioned acts and/or omissions by **RESPONDENTS**, decedent **ABEL** was shot, severely injured and later died.

As a direct and legal result of said violations and of the aforementioned acts and/or omissions by **RESPONDENTS**, **CLAIMANTS** suffered the damages as set forth below.

## **V. DAMAGES**

As a direct and legal result of the combined wrongful acts of **RESPONDENTS**, and each of them, **CLAIMANTS** have suffered substantial economic and non-economic losses and damages as set forth herein below.

As a further direct and legal result of the combined wrongful acts of **RESPONDENTS**, **CLAIMANTS** have incurred funeral expenses and burial expenses on behalf of **ABEL** in the amount of \$20,397.53. See **Exhibit A** attached.

As a further direct and legal result of the combined wrongful acts of **RESPONDENTS**, **CLAIMANT ESTATE** incurred medical expenses for care and treatment prior to **ABEL**'s death.

The **ESTATE** seeks recovery of said expenses in an amount to be established by appropriate proof. See **Exhibit B** attached for medical bills received to date.


As a further direct and legal result of the combined wrongful acts of **RESPONDENTS**, **CLAIMANT MAYRA** has suffered loss of love, society, solace, companionship, comfort, care, assistance, protection, affection, society, and moral support in an amount to be established by appropriate proof.

**CLAIMANTS** hereby submit their claim for damages.

Dated: February 14, 2018

**COTCHETT, PITRE & McCARTHY, LLP**

By:



FRANK M. PITRE  
ALISON E. CORDOVA  
*Attorneys for Plaintiffs*