Date: July 26, 2011

Item No. 17 & 18
File No. 11047

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

☒	**Dorian Maxwell against SFMTA**
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Completed by: Chris Rustom **Date:** July 21, 2011

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

Direct Dial: (415) 554-3914
Email: jerry.threet@sfgov.org

MEMORANDUM
PRIVILEGED AND CONFIDENTIAL

TO: Sunshine Ordinance Task Force

FROM: Jerry Threet
Deputy City Attorney

DATE: July 22, 2011

RE: ***Dorian Maxwell v. Metropolitan Transportation Agency (11047)***

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Dorian Maxwell ("Complainant") alleges that Metropolitan Transportation Agency ("MTA") willfully withheld a document responsive to his May 24, 2011 request related to Trust Fund Contribution or trust fund payments pursuant to agreement between the MTA and the TWU local 250-A and 9163 Transit Operators for the period 2008 - 2011.

COMPLAINANT FILES COMPLAINT:

On June 17, 2011, Complainant filed this complaint against MTA.

JURISDICTION:

MTA is a City department subject to the provisions of the Sunshine Ordinance. The Department does not contest jurisdiction.

APPLICABLE STATUTORY SECTION(S):

- Section 67.21 governs the process for gaining access to public records.
- Section 67.25 governs the immediacy of response.
- Section 67.26 governs the withholding of records.
- Section 67.27 governs the written justifications for withholding of records.

APPLICABLE CASE LAW:

None

ISSUES TO BE DETERMINED

Uncontested Facts: Complainant alleges that he made the above described public records request on May 24, 2011 and that on June 4, 2011, MTA responded by providing records. Complainant further alleges that on June 17, 2011, MTA responded that is had no further responsive records. Complainant further alleges that MTA willfully failed to provide responsive documents, which he describes as "a doctrine of waiver." As evidence of the withholding, Complainant provides the City's Answer to a lawsuit filed by TWU local 250-A against the City, in which the City alleges the following as one of its affirmative defenses:

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"Plaintiffs are barred from recovery, by virtue of their own conduct in reference to all matters complained of, by the doctrine of waiver."

Contested Facts: As of the date of this memorandum, I have not been provided with any response from MTA to the complaint, so it is unclear what, if any, allegations they contest.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- Did MTA in fact withhold any responsive documents?
- What is the "doctrine of waiver" that Complainant refers to? Is it actually a document, or instead a legal doctrine enshrined in state law?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Did the MTA willfully withhold any responsive documents?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

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TO: Sunshine Ordinance Task Force
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CHAPTER 67, SAN FRANCISCO ADMINISTRATIVE CODE (SUNSHINE ORDINANCE)

SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.
(b) A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.
. . .
SEC. 67.25. IMMEDIACY OF RESPONSE.
(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.
(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6456.1, the requester shall be notified as required by the close of business on the business day following the request.
(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester's purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.
(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably possible on an incremental or "rolling" basis such that responsive records are produced as soon as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this article.

MEMORANDUM
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TO: Sunshine Ordinance Task Force
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SEC. 67.26. WITHHOLDING KEPT TO A MINIMUM.
No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request.

SEC. 67.27. JUSTIFICATION OF WITHHOLDING.
Any withholding of information shall be justified, in writing, as follows:
(a) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority.
(b) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere.
(c) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency's litigation experience, supporting that position.
(d) When a record being requested contains information, most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available.

CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)

SECTION 6253
(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

(d) **Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records**. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

SECTION 6255. JUSTIFICATION FOR WITHHOLDING OF RECORDS

(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

Jun 22 11 10:17a Sunshine Ord. Task Force 415-554-7[illegible] p.1
Jun 22 11 10:12a Dorian Maxwell 415[redacted] p.1

SUNSHINE ORDINANCE TASK FORCE
1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco CA 94102
Tel. (415) 554-7724; Fax (415) 554-7854
http://www.sfgov.org/sunshine

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission SAN FRANCISCO MUNICIPAL TRANSIT AGENCY

Name of individual contacted at Department or Commission Caroline Celaya

☒ Alleged violation public records access
☐ Alleged violation of public meeting. Date of meeting _____

Sunshine Ordinance Section 67.26 withholding Kept to A MINIMUM
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach any relevant documentation supporting your complaint.

THE SFMTA willfully withholding doctrine of WAIVER THAT THEY STATED IN THEIR RESPONSE To Civil lawsuit CASE # CPF-11-511171. THAT THIS WAIVER EXIST. (SEE ATTACHED LAWSUIT RESPONSE) I ASKED For ANY AND ALL Documents relating to THE TWU Local 250A TRUST Fund.

Do you want a public hearing before the Sunshine Ordinance Task Force? ☒ yes ☐ no
Do you also want a pre-hearing conference before the Complaint Committee? ☐ yes ☐ no

(Optional)[1]
Name DORIAN MAXWELL Address _____

Telephone No. 415[redacted] E-Mail Address [redacted]@yahoo.com

Date 6-17-2011 _____
Signature

I request confidentiality of my personal information. ☒ yes ☐ no

[1] NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. Complainants can be anonymous as long as the complainant provides a reliable means of contact with the SOTF (Phone number, fax number, or e-mail address).

07/31/08

Jun 22 11 10:17a Sunshine Ord. Task Force 415-554-7[illegible] p.2
Jun 22 11 10:12a Dorian Maxwell 415[redacted] p.2

SFMTA | Municipal Transportation Agency

June 17, 2011

SENT VIA EMAIL
Dorian Maxwell
[redacted]@yahoo.com

RE: Public Records Request dated May 24, 2011

Dear Mr. Maxwell:

On behalf of the San Francisco Municipal Transportation Agency (the "SFMTA"), this letter responds to your public records request dated May 24, 2011. On June 3, 2011, the SFMTA provided responsive documents and invoked a 14 day extension – until June 14, 2011 – to respond to your request.

You have requested a copy of:

"any and all documents, actuarial studies, payout information, and legislation changes but not limited to regarding Trust Fund Contribution pursuant to articles 5 and 35 of 2008 thru 2011 Memorandum of Understanding between Transport Workers Union Local 250-A an 9163 classification employee organization and the SFMTA (CCSF). I also do hereby request to include any article 35 agreements between TWU Local 250-A and the SFMTA (aka C.C.S.F.)Regarding any future A.8404Trust Fund payouts. The Documents requested for the following Fiscal years 2008 thru 2010."

After reviewing our records, the SFMTA has determined that the agency does not have any additional records responsive to your request.

Please do not hesitate to contact the Sunshine request line at 701.4670 or sfmtasunshinerequests@sfmta.com if you have further questions on this matter. Thank you for your consideration.

Sincerely,

Caroline Celaya

San Francisco Municipal Transportation Agency
One South Van Ness Avenue, Seventh Fl. San Francisco, CA 94103 | Tel: 415.701.4500 | Fax: 415.701.4430 | www.sfmta.com

Jun 22 11 10:23a	Sunshine Ord. Task Force	415-554-7[illegible]	p.1
Jun 22 11 10:14a	Dorian Maxwell	415[redacted]	p.1

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Document Scanning Lead Sheet

Jun-02-2011 3:45 pm

Case Number: CPF-11-511171
Filing Date: Jun-02-2011 3:44
Juke Box: 001 Image: 03230410
ANSWER

RT WORKER UNION OF AMERICAN LOCAL 250-A et al VS. CITY AND COUNTY OF SAN F

001C03230410

Instructions:
Please place this sheet on top of the document to be scanned.

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Attorneys for Respondents/Defendants
City and County of San Francisco,
including its constituent agency, the San
Francisco Municipal Transportation Agency,
and Tom Nolan and Nathaniel P. Ford, Sr.
in their official capacities

2011 APR -2 PM 2:25

BY: DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO

TRANSPORT WORKERS UNION OF AMERICA LOCAL 250-ANGEL A. CARVAJAL, and BILLY F. GIBSON, Petitioners and Plaintiffs vs. CITY & COUNTY OF SAN FRANCISCO, SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, TOM NOLAN, and NATHANIEL P. FORD, SR., Respondents and Defendants.	CASE NO: CPF-11-511171 BY FAX **RESPONDENTS' AND DEFENDANTS' ANSWER AND RESPONSE TO PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY JUDGMENT** Date Action Filed: March 25, 2011 Judge: TBD Trial: TBD

Respondents and Defendants CITY AND COUNTY OF SAN FRANCISCO, including its constituent agency, the SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, and TOM NOLAN and NATHANIEL P. FORD, SR. in their official capacities (hereinafter collectively "Defendants"), in answer and response to the Petition for Writ of Mandate and Complaint for Declaratory Judgment (hereinafter "Petition") on file herein and each cause of action thereof, and subject to proof of valid service, admit, deny and affirmatively allege as follows:

1. In response to paragraph 1 of the Petition, Defendants are informed and believe that the status of Plaintiff TRANSPORT WORKERS UNION OF AMERICA LOCAL 250-A, AFL-CIO as a recognized bargaining representative for employees of the City and County of San Francisco, as defined by various state and municipal laws, and collective bargaining agreements to which LOCAL 250-A is a party, and that those laws and agreements speak for themselves.

2. In response to paragraph 2 of the Petition, Defendants admit that Petitioners and Plaintiffs Carvajal and Gibson are 9163 transit operators and civil service employees of the City and County of San Francisco, working in its constituent agency, the Municipal Transportation Agency. With the exception of matters specifically admitted, Defendants deny each and every allegation contained in paragraph 2 of the Petition.

3. In response to paragraph 3 of the Petition, Defendants deny the allegations contained therein, and affirmatively allege that the CITY AND COUNTY OF SAN FRANCISCO is a charter city and county.

4. In response to paragraph 4 of the Petition, Defendants admit that the MTA is the constituent agency of the City that operates the San Francisco Municipal Railway. Except as expressly so admitted, Defendants deny each and every allegation contained in Paragraph 4 of the Petition.

5. In response to paragraph 5 of the Petition, Defendants admit the allegations contained therein.

6. In response to paragraph 6 of the Petition, Defendants admit those allegations and affirmatively allege that Mr. Ford is the Director of Transportation for the Municipal Transportation Agency.

7. In response to paragraph 7 of the Petition, Defendants lack sufficient information and knowledge to enable them to form a belief as to the accuracy of the allegations contained therein, and placing their denial on that basis, Defendants deny each and every allegation contained in paragraph 7 of the Petition.

8. In response to paragraph 8 of the Petition, Defendants affirmatively allege that former Section A8.404(f) of the San Francisco Charter speaks for itself, and on those grounds Defendants deny each and every allegation contained in paragraph 8 of the Petition.

9. In response to paragraph 9 of the Petition, Defendants affirmatively allege that former Section A8.404(a) of the San Francisco Charter speaks for itself, and on those grounds Defendants deny each and every allegation contained in paragraph 9 of the Petition.

10. In response to paragraph 10 of the Petition, Defendants affirmatively allege that former Section A8.404(f) of the San Francisco Charter speaks for itself, and on those grounds Defendants deny each and every allegation contained in paragraph 10 of the Petition.

11. In response to paragraph 11 of the Petition, Defendants deny that former Charter Section A8.404 currently contains a subsection (f). Defendants affirmatively allege that in past years the City has procured actuarial reports to evaluate differences between vacation, retirement and health benefits made available to Muni drivers and those made available to operators of certain other agencies. Further, Defendants affirmatively allege that the 2009-2010 actuarial report speaks for itself. On these grounds Defendants deny each and every allegation contained in paragraph 11 of the Petition.

12. In response to paragraph 12 of the Petition, Defendants affirmatively allege that Exhibit 1 speaks for itself, and on those grounds Defendants deny each and every allegation contained in paragraph 12 of the Petition.

13. In response to paragraph 13 of the Petition, Defendants affirmatively allege that the unspecified actuarial reports, to the extent they exist, and the San Francisco Charter, speak for themselves, and on those grounds Defendants deny each and every allegation contained in paragraph 13 of the Petition.

14. In response to paragraph 14 of the Petition, Defendants deny the allegations of this paragraph.

15. In response to paragraph 15 of the Petition, Defendants admit that they have declined to make any contribution to the Trust Fund for the 2009-2010 fiscal year. Defendants affirmatively

allege that the City's Trust Fund contributions are a matter of public record, and that the unspecified actuarial reports and former Charter Section A8.404(f) speak for themselves. With the exception of matters specifically admitted, Defendants deny each and every remaining allegation contained in paragraph 15 of the Petition.

16. In response to paragraph 16 of the Petition, Defendants deny each and every allegation contained in paragraph 16 of the Petition.

17. In response to paragraph 17 of the Petition, Defendants repeat and reallege each and every admission, denial and affirmative allegation contained in paragraphs 1 through 16, inclusive, and incorporate said paragraphs herein as if fully set forth.

18. In response to paragraph 18 of the Petition, Defendants deny each and every allegation contained in paragraph 18 of the Petition.

19. In response to paragraph 19 of the Petition, Defendants deny each and ever allegation contained in paragraph 19 of the Petition.

20. In response to paragraph 20 of the Petition, Defendants deny each and every allegation contained in paragraph 20 of the Petition.

21. In response to paragraph 21 of the Petition, Defendants deny each and every allegation contained in paragraph 21 of the Petition.

22. In response to paragraph 22 of the Petition, Defendants repeat and reallege each and every admission, denial and affirmative allegation contained in paragraphs 1 through 21, inclusive, and incorporate said paragraphs herein as if fully set forth.

23. In response to paragraph 23 of the Petition, Defendants affirmatively allege that Plaintiffs and Petitioners have failed to adequately specify the alleged controversy and that Defendants therefore lack information and belief as to whether the alleged controversy exists, and on that ground Defendants deny each and every allegation contained in paragraph 23 of the Petition. Defendants affirmatively allege that former Charter Section A8.404(f) speaks for itself.

24. In response to paragraph 24 of the Petition, Defendants admit that Sheila Sexton, Esq. sent letters to Debra Johnson, Director of MTA Administration dated January 31, and February

14, 2011. With the exception of matters specifically admitted, Defendants deny each and every allegation contained therein.

25. Responding to the prayer for relief set forth in the Petition at p. 6, lines 2-22, Defendants deny that Plaintiffs are entitled to any of the relief requested, or any relief whatsoever.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses:

AS AND FOR A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to each and every cause of action of said Petition, Defendants allege that the alleged causes of action, and each of them, fail to state facts sufficient to constitute a cause of action as to these answering Defendants.

AS AND FOR A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to each and every cause of action of said Petition, Defendants allege that the causes of action purported to be stated by Plaintiffs in the Petition on file herein is barred by the appropriate Statute of Limitations applicable to each said purported cause of action, including without limitation, Code of Civil Procedure section 338.

AS AND FOR A THIRD, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE to each and every cause of action of said Petition, Defendants allege that said Petition does not state facts sufficient to constitute a cause of action in that it appears on the face of the Petition that Plaintiffs have inexcusably and unreasonably delayed the commencement of the action, to the prejudice of Defendants, and the action is barred by the doctrine of laches.

AS AND FOR A FOURTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs are barred from recovery, by virtue of their own conduct in reference to all matters complained of, by the doctrine of waiver.

AS AND FOR A FIFTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that the Plaintiffs herein, and each and every Cause of Action contained in the Petition, are barred by reason of acts, omissions, representations and courses of conduct by

AS AND FOR A THIRTEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that all Plaintiffs lack standing to bring this action.

AS AND FOR A FOURTEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs are barred from recovery under the doctrine of unconstitutional gift of public funds.

AS AND FOR A FIFTEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs would be unjustly enriched if the Court granted the relief prayed for in the Petition.

AS AND FOR A SIXTEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Defendants performed and discharged in good faith each and every obligation, if any, owed to Plaintiffs.

AS AND FOR AN SEVENTEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that they assume Messrs. Nolan and Ford are sued in their official capacities (and counsel is seeking to confirm this fact); if defendants' assumption is incorrect, and plaintiffs' are seeking to sue these officials in their individual capacity, then they are subject to dismissal because they are improperly sued and could not legally face any personal liability in this case. In any event, the individuals should be dismissed because they are not proper parties to this case.

AS AND FOR AN EIGHTEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that the Municipal Transportation Agency is not a proper party capable of being sued in that it is a constituent agency of the City and County of San Francisco.

AS AND FOR A NINETEENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that subject to discovery as to its precise legal status, the Transport Workers Union – San Francisco Municipal Railway Trust Fund may be an indispensable party to this action.

Plaintiffs by which Defendants were led to rely to their detriment, thereby barring, under the doctrine of equitable estoppel, any Causes of Action asserted by the Plaintiffs.

AS AND FOR A SIXTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs' claim is barred by the doctrine of unclean hands.

AS AND FOR A SEVENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE to each and every cause of action of said Petition, Defendants allege that, on information and belief, Plaintiffs' alleged injuries, if any there were, were aggravated by Plaintiffs' failure to use reasonable diligence to mitigate them.

AS AND FOR AN EIGHTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs are barred from recovery by failing to exhaust their administrative remedies.

AS AND FOR A NINTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs are barred from recovery under the doctrine of unilateral and/or mutual mistake in fact.

AS AND FOR A TENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that Plaintiffs are barred from recovery by failing to comply with the claims presentation requirements of the California Tort Claims Act, including, but not limited to, the provisions of California Government Code sections 905, 945.4 and 911.2.

AS AND FOR AN ELEVENTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that any and all acts or omissions by Defendants which allegedly caused the injuries or damages in said Petition, were the result of an exercise of discretion vested in them, and therefore Defendants are not liable pursuant to Government Code sections 815.2(b), 818.2 and 820.2, and other applicable law providing for discretionary immunity.

AS AND FOR A TWELFTH, SEPARATE, AND DISTINCT AFFIRMATIVE DEFENSE Defendants allege that at all times mentioned in the Petition on file herein and prior thereto, Defendants acted in conformity with applicable law, regulation and policy.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, California 94607.

On June 23, 2011, I served true copies of the following document(s) described as on the interested parties in this action as follows:

RESPONDENTS' AND DEFENDANTS' ANSWER AND RESPONSE TO PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY JUDGMENT

on:

Geoffrey Piller
Sheila K. Sexton
BEESON, TAYER & BODINE
1404 Franklin Street 5th Floor
Oakland, CA 94612
Facsimile: 510-625-8275

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY FAX TRANSMISSION: I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The telephone number of the sending facsimile machine was (510) 444-1108. No error was reported by the fax machine that I used.

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

Executed on June 23, 2011, at Oakland, California.

Kathy Thomas