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County of Orange

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF ORANGE

JAY CICINELLI,

Petitioner,

v.

CITY OF FULLERTON and CITY
COUNCIL OF THE CITY OF
FULLERTON,

Respondents.

Case No. 30-2017-00923829

Hon. Theodore Howard

ANSWER TO VERIFIED PETITION FOR
WRIT OF ADMINISTRATIVE AND
TRADITIONAL MANDATE

[Cal. Civ. Proc. Code §§ 1085; 1094.5]

[Action filed: June 2, 2017]

Respondent, Fullerton City Council ("Council") respectfully submits the following
in answer to the First Verified Petition for Writ of Mandate and Amended Complaint for
Declaratory, Injunctive and Extraordinary Relief in the above-captioned matter
(hereinafter referred to as "Complaint") as follows:

PARTIES

1. Council admits the allegations in Paragraph 1 of the Complaint.
2. Council admits that the City of Fullerton is a general law city, operating pursuant to the laws of the State of California. Council denies that the City is a subdivision of the State of California. Further, the Council admits that the City was the employer of Petitioner prior to his termination.
3. Council admits the allegations in Paragraph 3 of the Complaint.

1 **BACKGROUND FACTS**

2 4. Council is informed and believes that Petitioner was a reserve peace officer
3 for the Fullerton Police Department ("FPD") beginning in or about July 1998 and a peace
4 officer for the FPD from in or about August 1999 to the time of termination, and that,
5 prior to his employment with FPD, he was previously employed as a peace officer with
6 the Los Angeles Police Department. On the basis of such information and belief, Council
7 admits these allegations. Except as expressly admitted herein, Council has insufficient
8 knowledge or belief to admit or deny the remaining allegations in Paragraph 4 of the
9 Complaint, and on that basis denies any and all such remaining allegations.

10 5. Council is informed and believes that Petitioner was hired by the Fullerton
11 Police Department in or about July 1998 as a reserve peace officer, and on that basis
12 admits this allegation. Except as expressly admitted herein, Council has insufficient
13 knowledge or belief to admit or deny the remaining allegations in Paragraph 5 of the
14 Complaint, and on that basis denies any and all such remaining allegations.

15 6. Council admits the allegations in Paragraph 6.

16 7. Council admits that at least two "Code 3" calls for assistance were made in
17 relation to other officers' interaction with Kelly Thomas on July 5, 2011, and that such
18 call is a request for immediate assistance by other officers. Except as expressly admitted
19 herein, Council has insufficient knowledge or belief to admit or deny the remaining
20 allegations in Paragraph 7 of the Complaint, and on that basis denies any and all such
21 remaining allegations.

22 8. Council admits that Petitioner came upon fellow officers, Manuel Ramos
23 and Joseph Wolfe, in a physical struggle with Kelly Thomas on July 5, 2011 at the time
24 Petitioner arrived on scene. Except as expressly admitted herein, Council has insufficient
25 knowledge or belief to admit or deny the remaining allegations in Paragraph 8 of the
26 Complaint, and on that basis denies any and all such remaining allegations.

27 9. Council admits that Petitioner exited his vehicle upon arriving on scene and,
28 within approximately six seconds thereafter, he struck Mr. Thomas on the side of the head

1 with a knee. Council further admits that Petitioner admitted at various points in time that
2 he delivered two (2) strikes to the side of Thomas' head, but that this fact was not always
3 reported by Petitioner as two strikes to the head. Council also admits that Petitioner has
4 asserted that his knee strike was not intended as deadly force, that the knee strikes were
5 only "half" strikes, and that he never took the foot of his striking knee off the ground.
6 Except as expressly admitted herein, Council has insufficient knowledge or belief to admit
7 or deny the remaining allegations in Paragraph 9 of the Complaint, and on that basis
8 denies any and all such remaining allegations.

9 10. Council admits that Petitioner's Taser was deployed on Mr. Thomas during
10 the physical struggle with officers. Except as expressly admitted herein, Council has
11 insufficient knowledge or belief to admit or deny the remaining allegations in Paragraph
12 10 of the Complaint, and on that basis denies any and all such remaining allegations.

13 11. Council admits that Petitioner's Taser was deployed on Mr. Thomas during
14 the physical struggle with officers. Except as expressly admitted herein, Council has
15 insufficient knowledge or belief to admit or deny the remaining allegations in Paragraph
16 11 of the Complaint, and on that basis denies any and all such remaining allegations.

17 12. Council has insufficient knowledge or belief to admit or deny the allegations
18 in Paragraph 12 of the Complaint, and on that basis denies any and all such allegations.

19 13. Council has insufficient knowledge or belief to admit or deny the allegations
20 in Paragraph 13 of the Complaint, and on that basis denies any and all such allegations.

21 14. Council admits that Petitioner struck Mr. Thomas in the head with
22 Petitioner's Taser on multiple occasions. Except as expressly admitted herein, Council
23 has insufficient knowledge or belief to admit or deny the remaining allegations in
24 Paragraph 14 of the Complaint, and on that basis denies any and all such remaining
25 allegations.

26 15. Council has insufficient knowledge or belief to admit or deny the allegations
27 in Paragraph 15 of the Complaint, and on that basis denies any and all such allegations.

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1 17. Council admits that Petitioner called for medical assistance for Mr. Thomas
2 at the scene after he had been physically restrained by officers. Except as expressly
3 admitted herein, Council has insufficient knowledge or belief to admit or deny the
4 remaining allegations in Paragraph 17 of the Complaint, and on that basis denies any and
5 all such remaining allegations.

6 18. Council admits that Kelly Thomas died on or about July 10, 2011. Except
7 as expressly admitted herein, Council has insufficient knowledge or belief to admit or
8 deny the remaining allegations in Paragraph 18 of the Complaint, and on that basis denies
9 any and all such remaining allegations.

10 19. Council admits that the death of Kelly Thomas caused public debate, and
11 that three City Council members were recalled subsequent to the incident. Except as
12 expressly admitted herein, Council has insufficient knowledge or belief to admit or deny
13 the remaining allegations in Paragraph 19 of the Complaint, and on that basis denies any
14 and all such remaining allegations.

15 20. Council admits that numerous individual members of the public spoke at the
16 Fullerton City Council meeting on August 2, 2011 relating to Kelly Thomas. Except as
17 expressly admitted herein, Council has insufficient knowledge or belief to admit or deny
18 the remaining allegations in Paragraph 20 of the Complaint, and on that basis denies any
19 and all such remaining allegations.

20 21. Council admits that Tony Bushala was among the members of the public
21 speaking about Kelly Thomas at the Fullerton City Council meeting on August 2, 2011.
22 Council admits that a recall petition was qualified for a special recall election called by
23 the Council for June 5, 2012, but denies that Mr. Bushala was a named proponent for the
24 recall petition. Council admits that one issue raised by recall proponents in the recall
25 petition was leadership by certain then-city council members, including but not limited to,
26 the Police Department and the death of Kelly Thomas. Except as expressly admitted
27 herein, Council has insufficient knowledge or belief to admit or deny the remaining
28

1 allegations in Paragraph 21 of the Complaint, and on that basis denies any and all such
2 remaining allegations.

3 22. Council denies the allegations in Paragraph 22.

4 23. Council has insufficient information or belief to either admit or deny the
5 allegations in Paragraph 23 of the Complaint, and on that basis deny any and all such
6 allegations.

7 24. Council has insufficient information or belief to either admit or deny the
8 allegations in Paragraph 24 of the Complaint, and on that basis deny any and all such
9 allegations.

10 25. Council has insufficient information or belief to either admit or deny the
11 allegations in Paragraph 25 of the Complaint, and on that basis deny any and all such
12 allegations.

13 26. Council has insufficient information or belief to either admit or deny the
14 allegations in Paragraph 26 of the Complaint, and on that basis deny any and all such
15 allegations.

16 27. Council has insufficient information or belief to either admit or deny the
17 allegations in Paragraph 27 of the Complaint, and on that basis deny any and all such
18 allegations.

19 28. Council has insufficient information or belief to either admit or deny the
20 allegations in Paragraph 28 of the Complaint, and on that basis deny any and all such
21 allegations.

22 29. Council has insufficient information or belief to either admit or deny the
23 allegations in Paragraph 29 of the Complaint, and on that basis deny any and all such
24 allegations.

25 30. Council admits that the recall petition voted on by electors at the June 5,
26 2012 special election recalled three then-City Council Members: F. Richard Jones; Don
27 Bankhead; and Patrick McKinley. Council further admits that the new Council Members
28 filling the recalled petitions were: Travis Kiger, Doug Chaffee and Greg Sebourn. Except

1 as expressly admitted herein, any and all remaining allegations in Paragraph 30 are
2 denied.

3 31. Council admits that, on or about May 21, 2012, then-Acting Chief of Police
4 Dan Hughes, issued a Notice of Proposed Dismissal to Petitioner, which gave notice of
5 the preliminary decision that Petitioner be dismissed from employment with the FPD.
6 Council further admits that such decision was based on identified violations of the
7 Fullerton Police Department Policy Manual, including but not limited to the following
8 facts and conclusion, which are stated in detail in the Notice itself:

- 9 • Unreasonable, unlawful or excessive force, as to strikes by Petitioner of Mr.
10 Thomas' head with Petitioner's knee, while two other officers were lying on top of
11 Mr. Thomas, while Mr. Thomas verbally expressed regret, and the knee strikes
12 could not have been for the purpose of "distraction" since Petitioner had "not
13 [been] trained by the Department to deliver distraction blows to a person's head";
- 14 • Unreasonable, unlawful or excessive force, as to strikes by Petitioner of Mr.
15 Thomas' face with the butt of Petitioner's Taser, when such act could reasonably
16 be expected to cause significant injury, officers then outnumbered Mr. Thomas
17 four-to-one, Petitioner had control of the Taser at the time of the blows, and Mr.
18 Thomas would have had difficulty complying with multiple officers;
- 19 • Conduct unbecoming an officer, as to statements made by Petitioner at the scene
20 immediately after the incident;
- 21 • Failure to activate Petitioner's Digital Audio Recorder, as required;
- 22 • Falsification of work-related records and work-related dishonesty, as to Petitioner's
23 accounts of the events, by his intentional minimizing of the number of times
24 Petitioner struck Mr. Thomas' face with the butt of the Taser; his increasing of the
25 number of times that Mr. Thomas purportedly attempted to grab the Taser; and his
26 later attributing the strikes to Mr. Thomas' face with the butt of the Taser, when he
27 had first attributed the strikes to the fact that Mr. Thomas' head was exposed and
28 the possibility of gaining control over Mr. Thomas.

1 Council further admits that the Notice did state that:

2 [W]hile the Coroner found that the force that [Petitioner] applied was a cause of the
3 death of Mr. Thomas,” the “decision [to terminate] is not dependent upon the cause
4 of death. That is, even if Mr. Thomas had survived the incident, . . . [Petitioner’s]
5 conduct would still warrant termination”

6 Except as expressly admitted herein, Council has insufficient knowledge or belief
7 to admit or deny the remaining allegations in Paragraph 31 of the Complaint, and on that
8 basis denies any and all such remaining allegations.

9 32. Council admits the allegations in Paragraph 32.

10 33. Council admits that on or about July 19, 2012, then-Acting Chief of Police
11 Dan Hughes, issued a Notice of Dismissal to Petitioner from employment with the FPD.
12 Council further admits that such decision was based on identified violations of the
13 Fullerton Police Department Policy Manual, including but not limited to the following
14 facts and conclusion, which are stated in detail in the Notice itself:

- 15 • Unreasonable, unlawful or excessive force, as to strikes by Petitioner of Mr.
16 Thomas’ head with Petitioner’s knee, while two other officers were lying on top of
17 Mr. Thomas, while Mr. Thomas verbally expressed regret, and the knee strikes
18 could not have been for the purpose of “distraction” since Petitioner had “not
19 [been] trained by the Department to deliver distraction blows to a person’s head”;
- 20 • Unreasonable, unlawful or excessive force, as to strikes by Petitioner of Mr.
21 Thomas’ face with the butt of Petitioner’s Taser, when such act could reasonably
22 be expected to cause significant injury, officers then outnumbered Mr. Thomas
23 four-to-one, Petitioner had control of the Taser at the time of the blows, and Mr.
24 Thomas would have had difficulty complying with multiple officers;
- 25 • Conduct unbecoming an officer, as to statements made by Petitioner at the scene
26 immediately after the incident;
- 27 • Failure to activate Petitioner’s Digital Audio Recorder, as required.

1 In this Notice, then-Acting Chief Hughes removed references to violations relating
2 to falsification of work-related records and work-related dishonesty, concluding that
3 Petitioner was “not intentionally dishonest” as to his “various reports of the events on July
4 5, 2011,” although there remained “discrepancies in [Petitioner’s] accounts of what
5 occurred.”

6 Council further admits that the Notice did state that:

7 [W]hile the Coroner found that the force that [Petitioner] applied was a cause of the
8 death of Mr. Thomas,” the “decision [to terminate] is not dependent upon the cause
9 of death. That is, even if Mr. Thomas had survived the incident, . . . [Petitioner’s]
10 conduct would still warrant termination”

11 Except as expressly admitted herein, Council has insufficient knowledge or belief
12 to admit or deny the remaining allegations in Paragraph 33 of the Complaint, and on that
13 basis denies any and all such remaining allegations.

14 34. Council admits that Petitioner timely appealed his termination as permitted
15 by Article 45 of the referenced Agreement, which speaks for itself as to the applicable
16 administrative appeal procedures. Nonetheless, the Council admits that the matter was
17 considered by Hearing Officer Michael Prihar, who issued written Findings and
18 Recommendations, which were considered on appeal to the City Council. Except as
19 expressly admitted or denied herein, Council denies any and all remaining allegations in
20 Paragraph 34.

21 35. Council admits that the provisions of Article 45 of the referenced
22 Agreement govern the appeal by Petitioner as to the relevant discipline imposed on him,
23 and that the content of such Agreement speaks for itself. Council further admits the text
24 contained within Paragraph 35 quotes pertinent parts of Article 45. However, this
25 paragraph does not contain factual allegations to which response is otherwise required,
26 and so no response is provided.

27 36. Council admits that Petitioner was acquitted by a jury of criminal charges
28 brought against him relating to the incident involving Mr. Thomas on or about January 13,

1 2014. Except as expressly admitted herein, Council has insufficient knowledge or belief
2 to admit or deny the remaining allegations in Paragraph 36 of the Complaint, and on that
3 basis denies any and all such remaining allegations.

4 37. Council admits that some members of the public gathered in public areas
5 within the City, including the Transportation Center and in front of the Fullerton Police
6 Department, and that gatherings occurred in other public locations outside the City, after
7 the acquittal verdicts were announced. Except as expressly admitted herein, Council has
8 insufficient knowledge or belief to admit or deny the remaining allegations in Paragraph
9 37 of the Complaint, and on that basis denies any and all such remaining allegations.

10 38. Council admits that Petitioner appealed his termination, which proceeded to
11 administrative hearings on eight days before Michael Prihar during the months of March,
12 July and December 2015. Except as expressly admitted herein, Council denies any
13 remaining allegations in Paragraph 38 of the Complaint.

14 39. Council admits the allegations in Paragraph 39 of the Complaint.

15 40. Council admits that it and Petitioner stipulated, prior to the hearing on
16 Petitioner's administrative appeal as to employee discipline, that "[t]he cause of death and
17 manner of death [of Kelly Thomas] are not at issue." Except as expressly admitted herein,
18 Council has insufficient knowledge or belief to admit or deny the remaining allegations in
19 Paragraph 40 of the Complaint, and on that basis denies any and all such remaining
20 allegations.

21 41. Council admits that its then-members approved a settlement in closed
22 session on November 23, 2015 of litigation then-pending against the City of Fullerton
23 brought by the father Kelly Thomas, which settlement was reported out during the public
24 portion of the City Council's meeting on November 25, 2015, as required by California
25 Government Code Section 54956.9 (d)(1). After announcement of the settlement by the
26 City Attorney, the following Council Members made statements regarding the settlement
27 decision, which statements speak for themselves: Doug Chaffee, Bruce Whitaker,
28 Jennifer Fitzgerald (then-Mayor Pro Tem), and Greg Sebourn (then-Mayor). Except as

1 expressly admitted herein, Council denies any and all remaining allegations in Paragraph
2 41.

3 42. Council admits that its then-members approved a settlement in closed
4 session on November 23, 2015 of the litigation then-pending against the City of Fullerton
5 brought by the father Kelly Thomas, which settlement was reported out during the public
6 portion of the City Council's meeting on November 25, 2015, as required by California
7 Government Code Section 54956.9 (d)(1). After announcement of the settlement by the
8 City Attorney, the following Council Members made statements regarding the settlement
9 decision, which statements speak for themselves: Doug Chaffee, Bruce Whitaker,
10 Jennifer Fitzgerald (then-Mayor Pro Tem), and Greg Sebourn (then-Mayor). Except as
11 expressly admitted herein, Council denies any and all remaining allegations in Paragraph
12 42.

13 43. Council admits that, after hearing and submission of the appeal by Jay
14 Cicinelli to Hearing Officer Michael Prihar, he issued his written "Hearing Officer's
15 Findings and Recommendations" dated October 30, 2016, and the content of this
16 document speaks for itself. Nevertheless, Council admits that Mr. Prihar found that the
17 City's decision to terminate Petitioner did not violate an express provision of the
18 Employer-Employee Relations Resolution, and the City's decision to terminate under the
19 circumstances was otherwise unreasonable. Council admits that Mr. Prihar found that the
20 only sustained charge against Petitioner was relating to his inappropriate statements after
21 conclusion of the physical struggle with Mr. Thomas, and that termination for this offense
22 was unreasonable. Council further admits that Mr. Prihar recommended that Petitioner be
23 reinstated with back pay and benefits, with only a thirty-day suspension without pay as
24 discipline. Except as expressly admitted herein, Council has insufficient knowledge or
25 belief to admit or deny the remaining allegations in Paragraph 43 of the Complaint, and on
26 that basis denies any and all such remaining allegations.

27 44. Council admits that Prihar made findings and recommendations and that
28 such findings and recommendations speak for themselves. Nevertheless, Council admits

1 that Prihar found Petitioner's knee strikes and use of the Taser to Thomas' face reasonable
2 under the circumstances, and he recommended that Petitioner be reinstated. Except as
3 expressly admitted herein, Council has insufficient knowledge or belief to admit or deny
4 the remaining allegations in Paragraph 44 of the Complaint, and on that basis denies any
5 and all such remaining allegations.

6 45. Council admits that Prihar made findings and recommendations and that
7 such findings and recommendations speak for themselves. Nevertheless, Council admits
8 that Prihar found Petitioner's knee strikes and use of the Taser to Thomas' face reasonable
9 under the circumstances, and he recommended that Petitioner be reinstated. Except as
10 expressly admitted herein, Council has insufficient knowledge or belief to admit or deny
11 the remaining allegations in Paragraph 45 of the Complaint, and on that basis denies any
12 and all such remaining allegations.

13 46. Council admits that Prihar's findings and recommendations speak for
14 themselves. Notwithstanding, Council admits that Prihar found sufficient evidence to
15 conclude a violation of Police Department policy as to highly unprofessional posturing by
16 Petitioner after the incident, which was offensive, embarrassing and harmful to the
17 Department's reputation and image in the community. Except as expressly admitted
18 herein, Council denies any remaining allegations in Paragraph 46 of the Complaint.

19 47. Council is informed and believes that legal counsel for the City appealed
20 Prihar's Findings and Recommendations by letter to Gretchen Beatty, the City's Human
21 Resources Director, dated November 28, 2016. Except as expressly admitted herein,
22 Council has insufficient knowledge or belief to admit or deny the remaining allegations in
23 Paragraph 47 of the Complaint, and on that basis denies any and all such remaining
24 allegations.

25 48. Council is informed and believe that Petitioner's counsel submitted a letter
26 to Gretchen Beatty, the City's Human Resources Director, dated December 2, 2016,
27 wherein he asserted "Corporal Cicinelli's demand to recuse the Council from reviewing
28 the matter [of Petitioner's administrative appeal of his termination], based upon its' [sic]

1 members' publicly-articulated bias against Corporal Cicinelli and inappropriate pre-
2 judgment of the alleged facts." Except as expressly admitted herein, Council has
3 insufficient knowledge or belief to admit or deny the remaining allegations in Paragraph
4 48 of the Complaint, and on that basis denies any and all such remaining allegations.

5 49. Council admits that it conducted a *de novo* review of the administrative
6 record relating to the appeal of the Hearing Officer's Findings and Recommendations, In
7 the Matter of the Appeal Between Jay Cicinelli and the City of Fullerton on February 7,
8 2017. Council further admits that it was provided and reviewed and considered: an
9 Administrative Record of the exhibits and documentation filed with Mr. Prihar for the
10 prior hearing; post-hearing briefs of the parties; oral argument by the parties on February
11 7, 2017. Council admits the motion for recusal was denied. Except as expressly admitted
12 herein, Council has insufficient knowledge or belief to admit or deny the remaining
13 allegations in Paragraph 49 of the Complaint, and on that basis denies any and all such
14 remaining allegations.

15 50. Council admits that it adopted its written "Findings, Determination and
16 Order" after due consideration of the appeal on March 7, 2017, and that the content of
17 such Order speaks for itself. Nonetheless, Council admits that its decision on the
18 administrative appeal was to uphold the dismissal of Petitioner from employment with
19 FPD. Council further admits that it unanimously adopted the Order, with all then-sitting
20 Council Members voting in favor of the Order, including all of the following: Mayor
21 Bruce Whitaker, Mayor Pro Tem Doug Chaffee, Councilmember Jennifer Fitzgerald,
22 Councilmember Greg Sebourn, and Councilmember Jesus Silva. Council denies any and
23 all remaining allegations in Paragraph 50.

24 51. Council admits that the content of its Findings, Determination and Order
25 dated March 7, 2017 speaks for itself. Nonetheless, Council admits that it considered Mr.
26 Prihar's findings and recommendations, and found that Mr. Prihar did not correctly apply
27 the standard of review, in that he determined whether Petitioner's force was reasonable
28 under the circumstances rather than whether the Chief of Police's decision was arbitrary,

1 capricious, discriminatory or otherwise unreasonable. Except as expressly admitted
2 herein, Council denies any and all remaining allegations in Paragraph 51 of the
3 Complaint.

4 52. Council admits that the content of its Findings, Determination and Order
5 dated March 7, 2017 speaks for itself. Nonetheless, Council admits that its Order found
6 that Prihar had “conjecture[d] that Thomas was displaying ‘aggressive’ resistance [which]
7 is contrary to Cicinelli’s testimony,” and that “[t]hus, Prihar exceeded the scope of
8 evidence to justify what in essence, was deadly force, rather than consider whether the
9 finding of excessive force by Hughes was arbitrary, capricious, discriminatory or
10 unreasonable under the circumstances, even assuming, arguendo, this fact is true.”
11 Council further admits that its Order states: “Prihar again uses facts not in evidence to
12 determine the level of force was reasonable rather than determine whether Hughes’
13 finding of excessive force was arbitrary, capricious, discriminatory or unreasonable under
14 the circumstances, assuming, arguendo, this fact is true.” Except as expressly admitted
15 herein, Council denies any and all remaining allegations in Paragraph 52 of the
16 Complaint.

17 53. Council admits that the content of its Findings, Determination and Order
18 dated March 7, 2017 speaks for itself. Nonetheless, Council admits that its Order states:
19 “Medically, the knee strike contributed to Thomas’ death, according to the autopsy. To
20 argue the knee strike did not occur or was not forceful or was performed based upon
21 police training flies in the face of objective medical evidence that is [sic] was the use of
22 deadly force unjustified in taking an unarmed man into custody. . . . Additionally, Prihar
23 took into account Cicinelli’s subjective belief that the knee strikes were not that hard or
24 that the TASER strikes were not full impact. . . . Here, the objective medical evidence
25 supports excessive force due to a subgaleal haemorrhage and broken facial bones leading
26 to the death of Thomas. Council cannot be guided by the arbitrator’s recommendation
27 regarding excessive force due to the improper standard of review and flat denial of
28 overwhelming medical evidence as to the cause of Thomas’ death. The simple fact of the

1 matter is that an unarmed man, who was actively resisting arrest, who had not attempted
2 to injure any officer by striking, kicking or biting, was beaten to death by officers who
3 used excessive force, particularly by Cicinelli who administered lethal blows to Thomas'
4 head and face." Except as expressly admitted herein, Council denies any and all
5 remaining allegations in Paragraph 53 of the Complaint.

6 54. Council admits that the content of its Findings, Determination and Order
7 dated March 7, 2017 speaks for itself. Nonetheless, Council admits that it found the
8 Department's DAR policy to be clear and concise as to the requirement to record all
9 requests for service, and that Prihar's finding that the policy was ambiguous was
10 unsupported by the evidence and the policy on its face. Further, the Council admits that it
11 found that Prihar agreed Petitioner's statements after the event violated Department
12 policy, but noted that Prihar had not determined that the Chief's decision to terminate "for
13 violation of this provision [of policy], was arbitrary, discriminatory or otherwise
14 unreasonable, and that "Cicinelli's 'heightened adrenalin and emotion' are no excuse."
15 Except as expressly admitted herein, Council denies any and all remaining allegations in
16 Paragraph 54 of the Complaint.

17 55. Paragraph 55 of the Complaint merely asserts legal conclusions that do not
18 require substantive response by either admission or denial, and none is thus provided by
19 the Council. Except as expressly admitted or denied herein, Council denies any and all
20 factual allegations in Paragraph 55 of the Complaint.

21 56. Council admits that its March 7, 2017 Findings, Determination and Order
22 was a final decision on the administrative appeal of Petitioner's disciplinary termination
23 from the FPD. Except as expressly admitted or denied herein, Council denies any and all
24 factual allegations in Paragraph 56 of the Complaint.

25 57. Paragraph 55 of the Complaint merely asserts legal conclusions that do not
26 require substantive response by either admission or denial, and none is thus provided by
27 the Council. Except as expressly admitted or denied herein, Council has insufficient
28

1 knowledge or belief to admit or deny the allegations in Paragraph 57 of the Complaint,
2 and on that basis denies any and all such allegations.

3 58. Council has insufficient knowledge or belief to admit or deny the allegations
4 in Paragraph 58 of the Complaint, and on that basis denies any and all such allegations.

5 59. Council has insufficient knowledge or belief to admit or deny the allegations
6 in Paragraph 59 of the Complaint, and on that basis denies any and all such allegations.

7 60. Council has insufficient knowledge or belief to admit or deny the allegations
8 in Paragraph 60 of the Complaint, and on that basis denies any and all such allegations.

9 **FIRST CAUSE OF ACTION**

10 **(Code of Civil Procedure § 1094.5 – Administrative Mandate)**

11 61. Council admits or denies the allegations contained in paragraphs 1 through
12 60, inclusive, as set forth above in accordance with each numbered paragraph, which
13 responses are incorporated herein by reference.

14 62. Council denies the allegations in Paragraph 62.

15 63. Council denies the allegations in Paragraph 63.

16 64. Council denies the allegations in Paragraph 64.

17 65. Council denies the allegations in Paragraph 65.

18 66. Council denies the allegations in Paragraph 66.

19 **SECOND CAUSE OF ACTION**

20 **(Code of Civil Procedure § 1085 – Traditional Mandate)**

21 67. Council admits or denies the allegations contained in paragraphs 1 through
22 66, inclusive, as set forth above in accordance with each numbered paragraph, which
23 responses are incorporated herein by reference.

24 68. Paragraph 68 of the Complaint merely asserts legal conclusions or merely
25 restates the laws and/or regulations quoted or paraphrased within this paragraph. Such
26 statements are not allegations and do not require substantive response by either admission
27 or denial, and none is thus provided by the Council. Notwithstanding, the Council does
28 not admit that any of the asserted law(s) and/or regulation(s) apply or govern the

1 circumstances in this matter, or that they apply or govern in the manner portrayed. Except
2 as expressly admitted herein, Council denies any and all factual allegations in Paragraph
3 68 of the Complaint.

4 69. Council admits that Petitioner was a full-time employee of the City prior to
5 his termination, and that he was generally entitled to due process as to the termination of
6 his employment. Except as expressly admitted herein, Council denies any and all
7 remaining allegations in Paragraph 69.

8 70. To the extent Paragraph 70 contains allegations which are merely
9 conclusions of law or merely restate laws and/or regulations quoted or paraphrased within
10 this paragraph, such statements are not allegations and do not require substantive response
11 by either admission or denial, and none is thus provided by the Council. Notwithstanding,
12 the Council does not admit that any of the asserted legal conclusions, law(s) and/or
13 regulation(s) apply or govern the circumstances in this matter, or that they apply or govern
14 in the manner asserted. To the extent Paragraph 70 contains factual allegations, such
15 factual allegations are all denied.

16 71. Council denies the allegations in Paragraph 71.

17 72. Council denies the allegations in Paragraph 72.

18 73. Council denies the allegations in Paragraph 73.

19 74. Council denies the allegations in Paragraph 74.

20 75. Council admits the general obligation to comply with applicable
21 constitutional requirements, but denies any allegation that such obligations have not been
22 met. Except as expressly admitted or denied herein, Council denies any and all remaining
23 allegations in Paragraph 75.

24 76. Council denies the allegations in Paragraph 76.

25 77. Council has insufficient information and believe to admit or deny the
26 allegations in Paragraph 77 and, on that basis, denies all such allegations.

27 78. Council has insufficient information and believe to admit or deny the
28 allegations in Paragraph 78 and, on that basis, denies all such allegations.

1 79. Council has insufficient information and believe to admit or deny the
2 allegations in Paragraph 79 and, on that basis, denies all such allegations.

3 **PRAYER FOR RELIEF**

4 Council denies, specifically and generally, that Petitioner is entitled to any relief
5 whatsoever, in any amount or form, as to any of his Causes of Action, First or Second.

6 **AFFIRMATIVE DEFENSES**

7 Council asserts all of the following affirmative defenses and reserves its right to
8 assert any additional affirmative defenses that may become known or evident
9 subsequently based on facts or discovery revealed or evident throughout the conduct of
10 litigation:

11 **FIRST AFFIRMATIVE DEFENSE**

12 **(Failure to State Claim)**

13 1. Petitioner has failed to state facts sufficient to constitute any claim for relief.

14 **SECOND AFFIRMATIVE DEFENSE**

15 **(Lawful Conduct)**

16 2. Council asserts that their conduct was at all times reasonable and lawful
17 under the circumstances.

18 **THIRD AFFIRMATIVE DEFENSE**

19 **(Proximate Cause)**

20 3. Any harm suffered by Petitioner (which is expressly denied herein) was the
21 direct or proximate result of Petitioner's own conduct or the conduct of others and not of
22 any wrongful or illegal conduct of Council.

23 **FOURTH AFFIRMATIVE DEFENSE**

24 **(Privilege)**

25 4. Any actions or inaction of Council, their officers, employees or agents were
26 at all times privileged and justified.

27 **FIFTH AFFIRMATIVE DEFENSE**

28 **(No Damage)**

1 5. Council asserts that Petitioner has not suffered any damage and/or any
2 reasonably certain damage.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 **(Waiver)**

5 6. Council asserts that, as a matter of fact and law, Petitioner has waived any
6 and all claims alleged by him.

7 **SEVENTH AFFIRMATIVE DEFENSE**

8 **(Estoppel)**

9 7. Council asserts that Petitioner is estopped from the relief to which he claims
10 entitlement.

11 **EIGHTH AFFIRMATIVE DEFENSE**

12 **(Acting in Good Faith, No Violation of Law)**

13 8. Council asserts they acted in good faith and neither directly nor indirectly
14 performed any acts whatsoever which would constitute a violation of any laws or
15 regulations or a violation of any right or any duty owed.

16 **NINTH AFFIRMATIVE DEFENSE**

17 **(Failure to Mitigate)**

18 9. Council asserts that each and all of the purported causes of action asserted
19 by Petitioner are barred by his failure to take actions to avoid and/or mitigate his damages,
20 if any.

21 **TENTH AFFIRMATIVE DEFENSE**

22 **(Laches)**

23 10. Council asserts that Petitioner's claims are barred by laches.

24 **ELEVENTH AFFIRMATIVE DEFENSE**

25 **(Complaint Uncertain)**

26 11. Each and all of the purported causes of action set forth in the Complaint are
27 uncertain, ambiguous and unintelligible.

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TWELFTH AFFIRMATIVE DEFENSE

(No Remedy)

12. Council asserts that Petitioner has requested relief which cannot be granted by this Court, namely the setting aside of his termination and/or the exercise of discretion in a particular manner.

THIRTEENTH AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

13. Council asserts that Petitioner has failed to exhaust all administrative remedies available to him, and is thus barred from asserting his claims, or portions thereof.

FOURTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

14. Council asserts that Petitioner's claims, or some of them, are barred by the applicable statute of limitations, including but not limited to the time required for the filing or a petition for writ of mandate.

FIFTEENTH AFFIRMATIVE DEFENSE

(Remedy at Law)

15. Council asserts that Petitioner has an adequate remedy in the ordinary course of law.

SIXTEENTH AFFIRMATIVE DEFENSE

(Govt. Tort Claim)

16. Each and all of the purported causes of action and theories of relief asserted in the Complaint are barred by Petitioner's failure to fully comply with the requirements of the Tort Claims Act (Cal. Govt. Code §§ 900, et seq.) as to those causes of action and theories of relief for which a claim is required.

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SIXTEENTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

17. Each and all of the purported causes of action asserted by petitioner are barred because Petitioner would be unjustly enriched if he prevailed under the Complaint or any causes of action purportedly set forth therein.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

18. Each and all of the purported causes of action in the Complaint are barred by virtue of Petitioner's unclean hands and inequitable and/or illegal conduct.

NINETEENTH AFFIRMATIVE DEFENSE

(Relief Cannot Be Granted as Requested)

19. Petitioner has requested relief which cannot be granted by this Court, namely how Respondent may exercise discretion vested in it, and/or remedies beyond the authority of this Court to issue, namely reinstatement, back pay and/or employee benefits.

TWENTIETH AFFIRMATIVE DEFENSE

(Improper Writ)

20. Petitioner has brought an improper writ, as there is no ministerial duty of Respondents to be enforced and/or any assertedly valid claims are moot.

PRAYER

WHEREFORE, Council prays as follows:

- 1. That the action be dismissed in its entirety and/or that judgment be entered in Council's favor and against Petitioner, and that Petitioner take nothing by reason of the Complaint;
- 2. That Answering Respondent Council be awarded costs incurred herein;
- 3. That Respondent Council recover its attorneys' fees incurred herein, as permitted by law; and


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4. That Answering Respondent Council be awarded such other, further and/or different relief as this Court may deem just, proper and equitable.

Dated: July 7, 2017

JONES & MAYER

By: 
JAMES R. TOUCHSTONE,
KRISTA MACNEVIN JEE
Attorneys for the Fullerton City Council

1 PROOF OF SERVICE

2 **STATE OF CALIFORNIA**)
3 **COUNTY OF ORANGE**) ss.

4 I am employed in the County of Orange, State of California. I am over the age of
5 18 and not a party to the within action. My business address is 3777 North Harbor Blvd.
6 Fullerton, CA 92835.

7 On July 7, 2017, I served the foregoing document described as: **ANSWER TO**
8 **VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE AND**
9 **TRADITIONAL MANDATE**, on each interested party listed below:

10 Michael D. Schwartz
11 Zachery A. Lopes
12 Rains Lucia Stern
13 St. Phalle & Silver, PC
14 3401 Centre Lake Drive, Suite 440
15 Ontario, CA 91761
16 MSchwartz@RLSlawyers.com
17 ZLopes@RLSlawyers.com
18 T: (909) 509-5001
19 F: (909) 509-5015

20 X (VIA MAIL) I placed the envelope for collection and mailing, following the
21 ordinary business practices.

22 I am readily familiar with Jones & Mayer's practice for collection and
23 processing of correspondence for mailing with the United States Postal Service.
24 Under that practice, it would be deposited with the United States Postal Service
25 on that same day with postage thereon fully prepaid at La Habra, California, in
26 the ordinary course of business. I am aware that on motion of the parties served,
27 service is presumed invalid if postal cancellation date or postage meter date is
28 more than one day after date of deposit for mailing affidavit.

— (VIA OVERNIGHT DELIVERY) I enclosed the documents in an envelope or
package provided by an overnight delivery carrier and addressed to each
interested party. I placed the envelope or package for collection and overnight
delivery in the overnight delivery carrier depository at Fullerton, California to
ensure next day delivery.

— (VIA PERSONAL SERVICE) I personally delivered the documents to each
interested party at the addresses listed. (1) For a party represented by an
attorney, delivery was made to the attorney or at the attorney's office by leaving
the documents, in an envelope or package clearly labeled to identify the attorney
being served, with a receptionist or an individual in charge of the office, between
the hours of nine in the morning and five in the evening. (2) For party, delivery
was made to the party or by leaving the documents at the party's residence with
some person not younger than 18 years of age between the hours of eight in the
morning and six in the evening.

— (VIA MESSENGER SERVICE) I served the documents by placing them in an
envelope or package addressed to each interested party and providing them to a

1 professional messenger service for service.

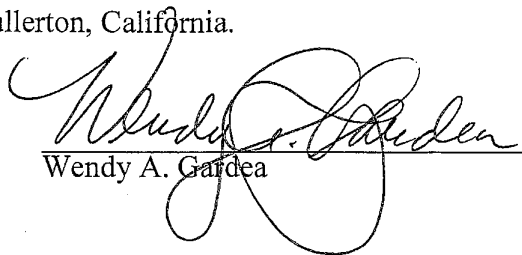
2 — (VIA FACSIMILE) Based on an agreement of the parties to accept service by fax
3 transmission, I faxed the documents to the persons at the fax numbers listed for
each interested party. No error was reported by the fax machine that I used.

4 — (VIA ELECTRONIC SERVICE) Based on an agreement of the parties to accept
5 service by electronic service, I served the documents by electronically
transmitting the document(s) listed above to the e-mail address(es) of the
person(s) set forth. The transmission was reported as complete and without error.

6 — (VIA ELECTRONIC SERVICE) By electronically transmitting the document(s)
7 listed above by the Court's CM/ECF system. *See Local Rule 5-4.1.*

8 I hereby certify that I am employed in the office of a member of the Bar of this
9 Court at whose direction the service was made.

10 Executed on July 7, 2017, at Fullerton, California.

11 
12 Wendy A. Gardea